88-2088

In the Supreme Court of the United States

OCTOBER TERM, 1983

BAYOU BOTTLING, INC.,

Petitioner,

vs.

DR PEPPER COMPANY, and COCA-COLA BOTTLING CO. OF LAKE CHARLES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Has the petitioner, as the only surviving competitor in an illegally monopolized market, suffered "antitrust injury" where the respondents blocked a procompetitive merger by petitioner, effected an anti-competitive merger and then used their resulting monopoly power to:

   a. foreclose effective price competition from the petitioner because of the great economies of scale resulting from the illegal merger;

   b. exclude from the market a competing, nationally advertised soft drink petitioner attempted to handle;

   c. exclude petitioner's products from 80% of the vending machines and coolers in the market;

   d. control 90% of the available store shelf space in the market;

   e. perpetuate below-cost and discriminatory pricing aimed at further reducing petitioner's market share?

2. In order for a court to determine whether a plaintiff has suffered "antitrust injury," should it first analyze the nature of the antitrust violations which were conceded to have occurred?

3. Is an antitrust plaintiff required to exclude hypothetical alternative non-antitrust causes of his injuries in order to show they are antitrust injuries?

4. Is a private plaintiff entitled to the remedy of divestiture under Section 16 of the Clayton Act where it is the only remaining competitor in a market that became monopolized through a merger conceded to be illegal under Section 7 of Clayton Act?

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REFERENCE TO REPORTS OF OPINIONS BELOW

The opinion of the Court of Appeals is reported at 725 F.2d 300 and is reproduced at App. 1 *et seq.* The opinion of the District Court is reported at 543 F. Supp. 1255 and is reproduced at App. 11 *et seq.*

JURISDICTION

The judgment of the Circuit Court of Appeals was made and entered on February 21, 1984. App. 43. A timely petition for rehearing and suggestion for rehearing in banc were denied on March 21, 1984. App. 45. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTES INVOLVED

Sherman Act, § 1 (15 U.S.C. § 1):

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . .

Sherman Act, § 2 (15 U.S.C. § 2):

> Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, . . .

Clayton Act, § 4 (15 U.S.C. § 15):

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Clayton Act § 7 (15 U.S.C. § 18):

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country,

the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Clayton Act, § 16 (15 U.S.C. § 26):

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this act [15 USCS §§ 13, 14, 18 and 19], when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, . . .

STATEMENT OF THE CASE

Petitioner, Bayou Bottling, Inc. (Bayou"), brought this action under Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act against respondents, Dr Pepper Company ("Dr Pepper") and Coca-Cola Bottling Company of Lake Charles, Louisiana ("LCC"), seeking treble damages under Section 4 of the Clayton Act and divestiture under Section 16 of the Clayton Act. The jurisdiction of the District Court was invoked under 28 U.S.C. section 1331. The United States District Court for the Western District of Louisiana, the Honorable Earl E. Veron, presiding, granted the defendants' motions for summary judgment. 543 F. Supp. 1255. The U.S. Court of Appeals for the Fifth Circuit affirmed the summary judgment on February 21, 1984. 725 F. 2d 300. Timely petitions for rehearing and rehearing en banc were denied on March 21, 1984.

Bayou is a wholesaler and distributor of soft drinks, principally as a franchisee of Pepsi Cola and 7-Up, headquartered in Lake Charles, Louisiana. Respondent LCC is also a wholesaler and distributor of soft drinks in Lake Charles, as well as in Lafayette, Louisiana. LCC's principal products are Coca-Cola and, since 1976, Dr Pepper. Respondent Dr Pepper manufactures the concentrate used to make the regular and diet versions of Dr Pepper. It sells concentrate to local franchisees, such as LCC, who produce and sell the soft drinks to a variety of retailers. The relevant product market is soft drinks. The relevant geographic market is the area covered by LCC's Dr Pepper franchise, which is approximately the southwest quadrant of the State of Louisiana and is substantially co-extensive with Bayou's franchise territory.

In 1974 the Dr Pepper franchise in Lake Charles was owned by one Lloyd Wilcox, who planned to sell his busi-

ness and retire. Dr Pepper was the No. 2 selling soft drink, with about 30% of the relevant market. There were only two prospective purchasers for the Wilcox franchise: Bayou, which had approximately 20% of the soft drink market, and LCC, which had approximately 50%. The business of bottling and wholesaling soft drinks entails significant economies of scale, so that the unit costs of Wilcox and Bayou were significantly higher than LCC's and their ability to offer effective price competition was correspondingly limited.

In April of 1975 Bayou and Wilcox reached an oral agreement that Bayou would purchase Wilcox's entire bottling business for $1 million.

However, Dr Pepper had a policy of combining its franchises with Coca-Cola franchises where possible. Pursuant to this policy, an officer of Dr Pepper dissuaded Wilcox from selling to Bayou and persuaded him to sell instead to LCC for $1 million, even though Bayou was ready, willing and able to proceed. It was established for purposes of the summary judgment motion that Bayou would have acquired the Wilcox franchise but for the concerted interference of Dr Pepper and LCC.

Bayou's proof showed that if it had acquired the Wilcox franchise, competition in the relevant market would have increased. The increase in Bayou's volume would have reduced its unit costs and placed it on a substantially equal competitive footing with LCC. In addition, Bayou would have been marketing one of the two nationally advertised drinks in the popular "pepper" flavor category, Dr Pepper, and LCC would have been marketing the other, Coca-Cola Company's Mr PiBB.

Respondents also conceded for purposes of their summary judgment motion that acquisition of the Wilcox fran-

chise by LCC not only precluded the improvement in competition that would have resulted from Bayou's acquisition of the franchise, but also further impaired competition. LCC's market share jumped due to the merger from 50% to 80%, resulting in monopolization of the market. Bayou was left with 20% of the market. This disparity meant, in practical terms, that LCC became substantially free from competitive pricing pressure.*

The LCC-Wilcox merger caused certain other disadvantages for Bayou that would not have occurred if Wilcox had retained his franchise or had sold it to a third party. For example, by the merger LCC acquired at least a 5-to-1 LCC advantage in vending machine sales plus the power to offer site owners the two top brands in this market (Coca Cola and Dr Pepper). This enabled LCC to induce the owners of vending machines to exclude Bayou's products in return for free servicing of their machines, since LCC can readily persuade them that its own products will substantially satisfy the market. In a similar fashion, the merger enhanced LCC's power to exclude Bayou's products from vending machines and coolers leased by LCC to various site owners. As a further direct result of the illegal 80% market share (defendants conceded the merger was illegal for purposes of the summary judgment motion) LCC gained overwhelming dominance in the

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* Due to the high-volume nature of the business, the increased *disparity* in market share meant increased disparity in economies of scale and unit costs. Bayou's unit cost disadvantage means it can no longer put significant pricing pressure on LCC. LCC can set its prices based on *Bayou's* (higher) unit costs and the difference (LCC's unit cost versus Bayou's) becomes LCC's monopolistic profit. In the monopolized market now existing, Bayou can only "follow" LCC's pricing, and LCC's sales manager admits LCC sets its prices without regard to competitive pressure. *See* Trahan and Dr. Mills affidavits, App. 68-69 and 91-92.

shelf space in retail stores and the arrangement of soft drinks thereon so as to maximize its sales and minimize Bayou's (the allocation of shelf space and arrangement of products thereon is largely left to the suppliers by store owners); L C engaged in discriminatory, below-cost pricing in Bayou's marketing area, but not in others, in specific response to a particular soft drink package which Bayou was successfully marketing.

After Bayou lost Wilcox's Dr Pepper franchise, it tried to obtain a Mr PiBB franchise from Coca-Cola Company but was repeatedly refused on the ground such franchise was available only to Coca-Cola bottlers. Respondents were aware of this policy at the time they arranged the LCC-Wilcox merger. Although it is a Coke bottler, LCC has agreed with Dr Pepper not to market Mr PiBB. When Bayou tried to develop its own "pepper" drink, Dr Pepper obtsructed Bayou's attempted trademark registration so that Bayou's efforts were frustrated. Dr Pepper is the only soft drink in its flavor category now sold in the relevant market.

ARGUMENT

I.

SPECIAL AND IMPORTANT REASONS EXIST WHY REVIEW ON WRIT OF CERTIORARI SHOULD BE GRANTED.

The decision of the Court of Appeals conflicts with decisions of other federal courts of apoeal in the matters of (1) what constitutes "antitrust injury" and (2) the right of a private party to obtain divestiture under Section 16 of the Clayton Act.

This Court should settle the questions of whether and under what circumstances a private party is entitled to the remedy of divestiture under Section 16 of the Clayton Act.

The Court of Appeals has restricted the damage remedy under Section 4 of the Clayton Act in a manner contrary to the rulings of this Court and to the intent of the Act.

II.

THIS COURT SHOULD CLARIFY WHAT IS MEANT BY "ANTITRUST INJURY."

Under *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), a plaintiff must show an injury caused by that which makes the defendants' acts unlawful.[1] Under

[1] The District Court erroneously stated (App. 22) Bayou "is of the firm belief" that it is entitled to compensation "for any and all injuries which would not have been suffered but for such alleged violations [of the antitrust laws]." Bayou never so contended. It has always recognized that not all injuries traceable to antitrust violations are compensable. However, once the nature of the defendants' antitrust violations is understood, we submit it becomes evident that the damages claimed by Bayou flow from that which made the defendants' acts unlawful and that there is no valid *Brunswick* objection to Bayou's claims.

Blue Shield of Virginia v. *McCready,* 457 U.S. 465, 472 (1982), courts are required to honor "Congress' 'expansive remedial purpose' in enacting Section 4" of the Clayton Act and, after examining a defendant's anti-competitive acts, compensate the damages forseeably caused by an illegal scheme. If the plaintiff is a "victim along the route" to defendants' illegal goal or if its injury is "inextricably intertwined" with the defendants' creation of a monopoly or if its injury is a forseeable or intended consequence of the defendants' illegal acts, then it has suffered antitrust injury under *McCready.* 457 U.S. at 479, 484. Under *Associated General Contractors* v. *California State Council of Carpenters,* .... U.S. ...., 103 S. Ct. 897, 908-12, 74 L. Ed. 2d 723 (1983), courts must evaluate the relationship between the violation and the claimed injury in terms of a number of factors, including causal relationship, motivation, nature of the injury, directness, speculative nature of damages and possibility of duplicative recovery. *See, McDonald* v. *Johnson & Johnson,* 722 F.2d 1370, 1373-74 (8th Cir. 1983).

In respect to the "antitrust injury" issue, this Court should take jurisdiction of the case to clarify the law in two important respects:

First, this Court should make clear that in resolving "antitrust injury" issues, a court must first analyze the nature of the *violation—i.e.,* analyze precisely what the violative characteristics of the defendants' behavior were—as the starting point in determining by application of the factors described by this court in *Associated General Contractors, supra,* 103 S. Ct. at 908-12, whether the claimed injuries arise from that violative conduct.

Second, this Court should reject the "alternative hypothetical cause" test relied upon by the District Court (App. 31) and Court of Appeals (App. 7) herein, since, we submit, that test is a misinterpretation of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc., supra,* 429 U.S. at 487.

A. A court must first analyze the nature of the violation before proceeding to determine whether the claimed injuries were incurred, under Brunswick, by reason of that violation.

We contend a fair determination as to whether "antitrust injury" has been inflicted cannot be made without first analyzing what it is about the defendants' activities that makes them antitrust violations. Neither the District Court nor the Court of Appeals here made any attempt to analyze the nature of the respondents' conceded antitrust violations. Had they done so, they could not have concluded that Bayou did not sustain antitrust injury.

For example, respondents conceded they had conspired to restrain trade in violation of Section 1 of the Sherman Act by (a) blocking a pro-competitive acquisition by Bayou and (b) accomplishing an anti-competitive, monopoly-creating acquisition by the respondent LCC. This was unlawful because it doubly frustrated the fundamental objective of the antitrust laws to preserve and encourage competition. Bayou's ability to compete was impaired by the respondents. The dual unlawfulness of the respondents' conduct here was precisely in preventing the enhancement of competition in this marketplace that, under Bayou's proofs, would have resulted if Bayou had obtained the Wilcox franchise, and instead causing a reduction from former levels of competition in the same marketplace. *See* Dr. Mills' affidavit, esp. at App. 90 *et seq.*, and generally the Trahan and Byrnes affidavits, App. 46 *et seq.*, 75 *et seq.* We submit that when one recognizes what the violative conduct was in the instant case, it is self-evident that Bayou's loss of the Dr Pepper franchise arose out of the antitrust violation and was an injury sustained "by reason of" forbidden antitrust misconduct, within the meaning of Section 4 of the Clayton Act, as interpreted by ***Brunswick, McCready*** and ***Associated General Contractors.***

Additional examples arise out of respondents' conceded monopolization of the relevant market in soft drink wholesaling.[2] The intentional creation of a monopoly by means of a merger is one of the clearest offenses under Section 2 of the Sherman Act.[3] III Areeda & Turner, *Antitrust Law*

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[2] The Court of Appeals made no effort to justify numerous plain errors which served as the foundation for the District Court's grant of summary judgment. For example, the District Court held (App. 26) ". . . the agreement between Dr Pepper and LCC to join hands against Bayou was not, standing alone, in restraint of trade or anticompetitive in effect." In fact, the respondents conceded for purposes of this summary judgment that the agreement was in restraint of trade and anticompetitive in effect. Similarly, the District Court stated that "though Bayou does not now compete on an equal footing with LCC, they (sic) do nonetheless compete." It was in fact conceded Bayou cannot provide *effective* competition, which is what the antitrust laws seek to protect. Further, contrary to the District Court's holding (App. 26) retail store owners and consumers *are* concededly hampered in their freedom to choose between LCC's products and Bayou's because Bayou cannot provide effective price competition to LCC. Remarkably, the District Court even found that "[c]ompetition is alive and well in the Lake Charles softdrink industry . . ." (App. 39), even though the defendants conceded that the market is monopolized.

[3] Another remarkable District Court holding (which the Court of Appeals did not attempt to justify) was that "Bayou has failed to demonstrate to this court any facts which could give rise to a reasonable inference that LCC's market dominance is the result of wilful acquisition of monopoly power" (App. 38) and that the record is ". . . devoid of evidence of intent to bring about a monopoly." (App. 39) The monopoly here was achieved by a merger, and the existence of the monopoly and wilful acquisition thereof were conceded for purposes of the summary judgment motion. *See, United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); [1955] Att'y Gen. Rep. 61 ("Companies do not combine or conspire without an intent to make use of the power they thereby obtain.")

(footnote continued)

¶701a at 101-02 (1978) states:

> [W]hatever the original source of a monopoly, *a monopolist's acquisition of the assets of an actual or likely potential competitor is properly classified as exclusionary,* for it tends to augment or reinforce the monopoly *by means other than competition on the merits.* Moreover, a merger that creates or adds to monopoly power would plainly violate Clayton Act §7 where the firms involved are corporations, so that *divestiture of the acquired firm would be required in any event.* (Emphasis supplied.)

LCC's ability to exclude Bayou from vending machines, coolers and shelf space—the points of sale, where dominance really matters—*was achieved by an illegal merger.* The Court of Appeals states (App. 8):

> When LCC acquired Wilcox's Dr Pepper operation, it received that product's share of the shelf space. Bayou acknowledged that store owners apportion their shelf space on the basis of sales and that LCC has only that portion consistent with its total share of the soft drink market. But Bayou implies an antitrust injury and suggests an entitlement to more shelf space than its market share would justify. The district court correctly rejected this asserted antitrust injury.

Apart from the fact that Bayou never acknowledged that store owners apportion shelf space uninfluenced as to location, prominence and other sales-inducing factors by a monopoly bottler in the market, it seems self-evident that

(footnote continued)

United States v. *Griffith,* 335 U.S. 100, 105 (1948); *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131, 173 (1948). General intent to monopolize is present if monopoly is the probable result of what is done, "for no monopolist monopolizes unconscious of what he is doing." *American Tobacco Co.* v. *United States,* 328 U.S. 781, 814 (1946); *United States* v. *Aluminum Co. of America,* 148 F.2d 416, 432 (2d Cir. 1945); *United States* v. *Paramount Pictures, Inc., supra,* 334 U.S. at 173.

the respondents' overwhelming dominance at the points of sale was the result and reflection of an illegally obtained monopolistic share. Respondents conceded as much in their appeal brief. The competitive disadvantage to the petitioner resulting from this monopolized state of the market is the clearest kind of antitrust injury, once it is recognized how the dominant share was obtained.

We have referred above to other specific ways Bayou was damaged precisely because it is in a monopolized market: its products are excluded from vending machines; it has little influence as to the amount or arrangement of shelf space; it cannot sell any drink in the "pepper" flavor category; it cannot fight for a larger market share through price competition because the disparity in unit costs has become so great. Respondents concede this dominance is a direct result of and reflects their monopoly. Respondents also concede the merger, *i.e.*, the violation, enhanced their power to exclude Bayou products from vending machines (both those leased and those owned by site owners) and that that enhancement has produced more exclusion of Bayou products and related additional losses in sales and profits by Bayou.

The Court of Appeals brushed these effects aside (App. 7) saying, "Without anything more, these practices are not barred by the antitrust laws," citing *Northeastern Telephone Co.* v. *American Telephone & Telegraph Co.*, 651 F.2d 76, 93 (2d Cir. 1981), to the effect that even monopolists are allowed to compete. The Court overlooked the decisive difference that in *Northeastern Telephone* the defendant obtained its monopoly legally (651 F.2d at 79, 85), whereas LCC's monopoly was obtained illegally.

The Court of Appeals thus took the unprecedented position that where a dominant competitor deliberately achieves illegal monopoly power the competitive advantages result-

ing from that power are immune from attack by disadvantaged competitors—that exclusionary practices made possible by that power are mere "competitive acts." Such a result is contrary to the purposes of the antitrust laws and cannot stand. We submit such a result would never have been reached if the Court of Appeals had analyzed the nature of the violations before proceeding to determine whether the claimed injuries could legitimately be considered to be effects of the violations within the meaning of *Brunswick, McCready* and *Associated General Contractors.*

B. This Court should reject the "alternative hypothetical cause" test relied upon by the District Court (App. 31) and Court of Appeals (App. 7).

As noted, had Bayou acquired the Dr Pepper franchise, competition in the Lake Charles marketing area would have been enhanced: LCC would have been faced with effective competition and two nationally advertised brands in the same flavor category (Dr Pepper and Mr PiBB) would have been marketed there instead of only one. Foreclosure of Bayou from the franchise is thus one of the things which made defendants' concerted conduct anticompetitive and therefore illegal under the antitrust laws. We submit it is clear Bayou's loss of the franchise was an injury flowing from that which made the defendants' acts unlawful.

The District Court held to the contrary on the ground "Bayou would have suffered this injury no matter who acquired the franchise, or if it had not been sold at all." (App. 31). This misapplication of *Brunswick* (see discussion below) became the determinative test utilized by the Court of Appeals (App. 7: "Bayou would have suffered the identical loss of sales, and economies of scale, if Wilcox had retained his operation or if he had sold to a third party"). Even if this test were factually tenable in the

instant case (it is not),[4] the test is an erroneous application of *Brunswick*, and would virtually rule out damage claims under Section 4 of the Clayton Act because any damage (even from a *per se* violation), whether a competitive injury or not, *could* result from a hypothetical cause not involving antitrust violation. It is, for example, no answer to a price-fixing charge that the victims might have been similarly injured by common cheating or failure to shop around. The respondents' interpretation of *Brunswick* adopted here by both Courts below is so sweeping that it makes the exception engulf the rule and effectively destroys Section 4.

The hypotheticals posed by the Courts below (that someone else acquired the franchise, or that it wasn't sold) may or may not involve anticompetitive conduct. If they did, the conduct could very well be the basis for an antitrust claim. The holdings below are contrary to repeated holdings that "Recovery can be had for a wrongfully frustrated attempt to enter a business." *See, e.g., Hayes* v. *Solomon,* 597 F.2d 958, 973 (5th Cir. 1979); *American Banana Co.* v. *United Fruit Co.,* 166 F.2d 261, 264 (2d Cir. 1908), *aff'd,* 213 U.S. 347 (1909): "It is as unlawful to prevent a person from engaging in business as it is to drive a person out of business." If the reasoning of the Courts below were accepted, no person frustrated in an attempt to enter a business could sue because it could always be hypothesized that the exclusion *could* have been caused by non-antitrust conduct or some other factor.

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[4] As repeatedly shown in the facts of this case, numerous injuries claimed by Bayou arise solely due to the fact that 80% of the market power has now been illegally concentrated in Bayou's one remaining competitor, LCC—which injuries would not have occurred had someone else acquired the franchise, or if it had not been sold at all.

The Courts below failed to read *Brunswick's* language in context. In *Brunswick,* Pueblo Bowl-O-Mat claimed injury because, if the number of competitors had *decreased,* it hoped to profit. Such a "loss"—resulting from Brunswick's efforts to *preserve* competition by acquiring the failing operations—was not related to Brunswick's size and is not compensable because the antitrust laws are not to be used to attack pro-competitive activity.

Bayou's injuries are not like *Brunswick's* plaintiff but result instead from *anti-competitive* activity by the respondents. They manifestly result from that which made respondents' conduct illegal in two respects. First, Bayou was prevented from achieving a size that would have placed it on an equal competitive footing with LCC. Second, LCC's market share escalated from 50% to a monopoly, with approximately 80% of the market. There is not *more* competition following the merger (as in *Brunswick*) but *less.*

The correct construction of the *Brunswick* language is shown by *Blue Shield of Virginia* v. *McCready,* 457 U.S. 465 (1982). In *McCready* the defendants' aim was to destroy competition from psychologists. Their means was to deny reimbursement to patients such as Mrs. McCready who had consulted psychologists. The Court held this actionable under the antitrust laws because injury to McCready was the "means by which competition was restricted" and her injury was inextricably intertwined with the injuries defendants sought to inflict on psychologists. Such injuries flowed from that which made the defendants' acts unlawful because the defendants' conspiracy against psychologists forseeably and intentionally injured McCready.

The conceded objective of the respondents' conspiracy here was to monopolize the market by depriving the petitioner of the Wilcox franchise and merging it instead into

LCC. Bayou's standing is even clearer than McCready's, however, because Bayou was the only remaining competitor once the monopoly was achieved and it was competitively hamstrung due to the economies of scale and increased unit cost advantage realized by LCC through the merger.

The Court of Appeals emphasized that if Wilcox had retained his operation or sold it to a third party, Bayou would be without the franchise without any antitrust violation having occurred. This Court should make clear that the fact that hypothetical non-anti-competitive conduct might have caused a similar injury is beside the point. What *did* happen is that LCC and Dr Pepper took the Wilcox franchise away from Bayou and placed it with LCC, creating a monopoly in the process and assuring Bayou would not achieve the competitive parity with LCC that would have resulted from Bayou's acquisition of the Wilcox franchise.

If the "alternative hypothetical cause" test adopted by the Courts below is allowed to stand and is followed, whole areas of antitrust damages will be thrown into enormous confusion. Proving such damages would become substantially impossible because an antitrust plaintiff would be called upon to prove his damages *could not* have been caused by some hypothetical non-antitrust misconduct—a fact which can never be proved.

III.

A PRIVATE ANTITRUST PLAINTIFF SHOULD BE ENTITLED TO DIVESTITURE AS A FORM OF INJUNCTIVE RELIEF UNDER SECTION 16 OF THE CLAYTON ACT.

This Court has not yet ruled on this important question, though it has been the subject of extensive scholarly writing and of conflicting decisions among the circuits. *See, e.g.*, II Areeda & Turner, *Antitrust Law*, §328b at 137 (1978); Note, "The Use of Divestiture in Private Anti-

trust Suits,'' 43 Geo. Wash. L. Rev., 261, 268 (1974); Note, ''Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act,'' 49 Minn. L. Rev. 267 (1974); ABA Antitrust Section, Antitrust Law Developments (2d ed. 1984), at 420-21. *Compare International Telephone & Telegraph Corp.* v. *General Telephone & Electronics Corp.*, 518 F.2d 913 (9th Cir. 1976), and *Calnetics Corp.* v. *Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir. 1976), with *Fuchs Sugar & Syrups, Inc.* v. *Amstar Corp.*, 402 F. Supp. 636, 640 (S.D.N.Y. 1975), and *Treadway Co.* v. *Brunswick Corp.*, 523 F.2d 262, 278-79 (3rd Cir. 1975), *rev'd on other grounds sub nom., Brunswick* v. *Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477 (1977). ABA, Section of Antitrust Law, Monograph 1, *The Private Enforcement of Section 7 of the Clayton Act*, states at 4:

> A principal question which the courts have confronted in private Section 7 actions is whether the equitable remedies available in such an action include divestiture. The crux of the problem is whether the word ''injunctive'' which describes the relief to be granted under Section 16 can include divestiture or is intended to be more limited. The answer is unclear and the issue is of evident importance.

Bayou sought divestiture under Section 16 of the Clayton Act on the ground that merging the Wilcox franchise into the LCC franchise violated Section 7 of the Clayton Act. The issue was fully briefed and argued in the District Court[5] and the Court of Appeals.[6] The District Court's decision ignored the issue entirely. The Court of Appeals did not expressly address the issue but apparently denied relief on the ground there was no antitrust injury. 725 F.2d at 305, App. 10.

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[5] Bayou's Brief in Opposition to Summary Judgment at 68-71, and Proposed Findings of Fact and Conclusions of Law at 23-24.

[6] Bayou's Brief at 45 and Reply Brief at 21-23.

There is ample evidence justifying Bayou's right to injunctive relief under Section 16 of the Clayton Act, because of the actual antitrust injuries it has sustained.[7] Even if it had suffered no injury by virtue of LCC's conceded monopolization and illegal merger, it is not necessary that a private party show *any* actual damage in order to obtain injunctive relief under Section 16. Threatened damage is enough. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 129-30 (1969). Bayou, attempting to stay alive as the only remaining competitor in the monopolized market, has not only been injured and threatened with injury but is also the person *most likely* to vindicate the purposes of the antitrust laws by challenging the merger which created the monopoly.

Congress intended private antitrust litigation to be a sure and effective weapon for enforcement of the antitrust laws. *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.,* 381 U.S. 311, 318 (1965). The Court stated in *Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra.,* at 130-31:

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[7] For example, LCC's possession of 80% of the shelf space in retail outlets is illegal, because it is the direct effect of the illegally achieved merger and market share; its 80% share of the shelf space gives its product a "billboard" impact upon consumers, rendering Bayou's products effectively unnoticed and resulting in further losses of sales and of market share by Bayou. (Dr. Mills and Trahan affidavits at App. 69-70, 92-93). Further, LCC uses its huge percentage of shelf space to bootstrap itself into an even higher percentage (and Bayou a correspondingly lower percentage) of the shelf space (*Id.* at App. 69-70, 92-93). Similarly, exclusion of Bayou's products from vending machines (both those leased by LCC to others and those owned by others) is enhanced by the monopolistic share of the market achieved by LCC, producing further losses of sales and profits for Bayou. (Dr. Mills 93-94, Trahan App. 72-73). See also the further injuries discussed above.

> [T]he purpose of giving private parties . . . injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws. Section 16 should be construed and applied with this purpose in mind, and with the knowledge that the [injunctive] remedy it affords, like other equitable remedies, is flexible and capable of nice "adjustment and reconciliation between the public interest and private needs as well as between competing private claims." Its availability should be "conditioned by the necessities of the public interest which Congress has sought to protect."

United States v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 328 (1961), a Section 7 case, held:

> The very words of §7 suggest that an undoing of the acquisition is a natural remedy. Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control and it is reasonable to think immediately of the same remedy when §7 of the Clayton Act, which particularizes the Sherman Act's standard of illegality, is involved. . . . Divestiture has been called the most important of the antitrust remedies. It is simple, relatively easy to administer and sure. *It should always be in the forefront of the court's mind when a violation of §7 has been found.* (Emphasis supplied.)

The violation of Section 7 in this case is conceded. The "undoing of the acquisition is a natural remedy" in private cases as much as in cases brought by the Government. As stated by Areeda & Turner, *id.* at 137:

> To hold a merger unlawful in a private suit while refusing to decree the undoing of that merger makes little sense in terms of antitrust policy.
>
> Fortunately, other courts [than the Ninth Circuit in the *ITT* case] have indicated, correctly, that divestiture is available in a private suit challenging unlawful

> mergers. . . [D]ivestiture is the normal and usual remedy against an unlawful merger, whether sued by the government or by a private plaintiff.

Bayou properly raised the issue in both courts below. Because of its great importance, the issue should be considered by this Court.

CONCLUSION

Based upon the foregoing considerations, the petitioner respectfully requests that a writ of certiorari issue to review the decision of the Court of Appeals.

Respectfully submitted,

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George P. Kersten
Attorneys for Petitioner

June 15, 1984

83-2088

No.

In the
Supreme Court of the United States

October Term, 1983

BAYOU BOTTLING, INC.,

Petitioner,

vs.

DR PEPPER COMPANY, and
COCA-COLA BOTTLING CO. OF LAKE CHARLES, INC.,

Respondents.

APPENDIX

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APPENDIX

APPENDIX

OPINION OF THE COURT OF APPEALS

BAYOU BOTTLING, INC.,

Plaintiff-Appellant,

v.

DR PEPPER COMPANY, et al.,

Defendants-Appellees.

No. 82-3516.

United States Court of Appeals, Fifth Circuit

Feb. 21, 1984.

[2136] Appeal from the United States District Court for the Western District of Louisiana.

Before CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

Bayou Bottling, Inc. brought this antitrust action under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and section 7 of the Clayton Act, 15 U.S.C. § 18, against Dr Pepper Company and Coca-Cola Bottling Company of Lake Charles, Louisiana (LCC). Bayou sought treble damages and an order of divestiture under sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26. Following the completion of lengthy discovery, the district court granted defendants' motions for summary judgment. 543 F.Supp. 1255. Concluding, as did the district court, that the alleged antitrust violations did not result in antitrust injury, we affirm.

Facts

For purposes of the summary judgment only, the defendants stipulated to the accuracy of Bayou's version of many of the dispositive facts, conceded the acquisition antitrust violations charged, but maintained that the violations did not result in a compensable antitrust injury. The facts are set forth in detail in the district court's opinion, 543 F.Supp. at 1257-1261. For the purposes of this appeal, we briefly summarize the relevant facts.

Bayou Bottling, Inc., a Louisiana corporation, is a wholesaler and distributor of soft drinks[1] in and around the cities of Lake Charles and Jennings, Louisiana. Bayou sells a broad range of drinks, most notably Pepsi-Cola and Seven-Up. Bayou does not manufacture the soft drink prod- [2137] ucts it sells. All of its bottled drinks are produced by a wholly-owned subsidiary, and all its canned drinks are produced by a company owned by various Pepsi-Cola bottlers.

Dr. Pepper Company, a Colorado corporation, manufactures the concentrate used in the production of Dr Pepper and Sugar Free Dr Pepper. In marketing its product, Dr Pepper utilizes a licensing agreement, or franchise, which authorizes a local bottler to produce and sell its soft drink line in a specified geographic area. The local bottlers determine prices and marketing strategy.

LCC, a Louisiana corporation, is a wholesaler and distributor of soft drinks in Lake Charles and Lafayette.

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[1] For purposes of the summary judgment motion, the parties defined soft drinks as nonalcoholic, nondairy beverages for human consumption, which are manufactured by addition of a flavored extract to water (usually carbonated), and purchased by the retail customer in consumable form, predominantly packaged in bottles or cans but also dispensed in nonpackaged form.

It manufactures and markets several soft drinks, notably including Coca-Cola and, since 1976, Dr Pepper.

The relevant product market is soft drinks and, for purposes of the summary judgment motion, the relevant geographical market is the area of southwest Louisiana encompassed by LCC's Dr Pepper franchise.

In early 1975 there were two Dr Pepper bottlers in southwest Louisiana, Clyde Johnson in Lafayette and Lloyd Wilcox in Lake Charles, both of whom were ready to retire from the business. Donald Antle, the vice-president in charge of franchises for Dr Pepper, encouraged the two men to sell their operations to Coca-Cola bottlers. For business reasons Dr Pepper favored the assignment of its franchises to Coca-Cola dealers. Representatives of Bayou and LCC negotiated with both sellers. Antle's urgings were unsuccessful with respect to the Johnson franchise; he sold to an affiliate of Bayou, a Pepsi-Cola bottler. The franchise assignment was approved by Dr Pepper.

The sale of the Wilcox franchise precipitated the present antitrust action. Allegedly, on April 23, 1975, Wilcox orally agreed to sell his business to Bayou for one million dollars. Their discussions continued on the morning of April 25, 1975, but later in the day, Antle, Wilcox and representatives of LCC executed a written agreement by which Wilcox agreed to sell to LCC for one million dollars. On May 23, 1975, Bayou filed suit in Louisiana state court seeking specific performance of the oral agreement purportedly reached on April 23, 1975. This suit foundered on Louisiana's Statute of Frauds, article 2275 of the Louisiana Civil Code, and was dismissed.

Bayou then brought the present action, charging the defendants with an agreement, combination and conspiracy in restraint of trade in violation of section 1 of the Sher-

man Act, premised on defendant's interference with Bayou's attempt to acquire the Wilcox bottling operation. Further, Bayou charged defendants with monopolization, attempting to monopolize and combining and conspiracy to monopolize in violation of section 2 of the Sherman Act, based on the claim that the Wilcox acquisition gave LCC a monopolistic market power which it exercised in an illegal manner. Finally, Bayou charged defendants with effecting a merger which restrained competition in the soft drink market, in violation of section 7 of the Clayton Act.

The core holding of the district court's grant of summary judgment, as we perceive it, is that Bayou's injuries are not antitrust injuries as that term is defined by *Brunswick Corp.* v. *Pueblo Bowl-O-Mat,* 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). On appeal, the principal issue before [2138] us is whether the charged violations of the antitrust laws resulted in any cognizable, compensable antitrust injury to Bayou. We also examine Bayou's allegations of predatory practices.

Analysis

The summary judgment vehicle is to be used sparingly, particularly in complex litigation, but it is available, despite apparent complexity, in a case in which there is no genuine issue of material fact in dispute. Summary judgment may be granted in an appropriate antitrust case. *Southway Theatres, Inc.* v. *Georgia Theatre Co.,* 672 F.2d 485 (5th Cir. 1982). In *Alladin Oil* v. *Texaco, Inc.,* 603 F.2d 1107, 1111 (5th Cir. 1979), we observed:

> simply because a case is based upon the antitrust laws does not suspend the application of Rule 56. The reason summary judgments may seem less common in antitrust cases is because such cases are ripe with

> issues of motive, intent and credibility which often must be inferred from the total circumstances.

The present case fits the summary judgment mold. The pertinent facts are stipulated or there is otherwise no genuine dispute. The issues presented are purely legal.

A plaintiff in a private antitrust action who seeks treble damages under section 4 of the Clayton Act must prove more than the defendant's violation of the antitrust laws. In *Brunswick,* a case involving a violation of section 7 of the Clayton Act, the Supreme Court held that one seeking treble damages must prove that the antitrust violations resulted in antitrust injuries:

> We . . . hold that for plaintiffs to recover treble damages on account of [an illegal acquisition], they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

Id. 429 U.S. at 489, 97 S.Ct. at 697 (*quoting Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 125, 89 S.Ct. 1562, 1577, 23 L.Ed.2d 129 (1969). In *Blue Shield of Virginia* v. *McCready,* 457 U.S. 465, 102 S.Ct. 2540, 2550, 73 L.Ed.2d 149 (1982), the Court reiterated that " '[C]ompetitors may be able to prove antitrust injury before they are actually driven from the market and competition is thereby lessened,' " (*quoting Brunswick,* 429 U.S. at 489, n. 14, 97 S.Ct. at 698, n. 14), but the Court did remove or lessen, as Bayou seems to imply, the essential

requirement that a section 4 plaintiff must establish an antitrust injury to competition.

The holding in *Brunswick,* which involved a violation of section 7 of the Clayton Act, has been accorded broader application. In *J. Truett Payne Co., Inc.* v. *Chrysler Motors Corp.,* 451 U.S. 557, 101 S.Ct. 1923, 68 L.Ed.2d 442 (1981), the Court applied *Brunswick* to violations of section 2(a) of the Clayton Act. In *Blue Shield of Virginia* v. *McCready,* while holding for the plaintiff, the Court clearly indicated that *Brunswick* applied to section 1 of the Sherman Act. *See also Associated General Contractors* v. *California State Council* [2139] *of Carpenters,* —— U.S. ——, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983). The Court has not yet extended *Brunswick* to instances involving section 2 of the Sherman Act, but we recently did so in *Multiflex, Inc.* v. *Samuel Moore & Co.,* 709 F.2d 980 (5th Cir. 1983).

Bayou complains that the defendants' antitrust violations caused it to suffer a series of antitrust injuries. First, Bayou claims an antitrust injury because it was prevented from acquiring Wilcox's franchise, an acquisition which would have improved its business position and increased its profits. This assertion of antitrust injury is foreclosed by the holding in *Brunswick.* The *Brunswick* case involved a bowling equipment manufacturer which acquired over two hundred bowling centers from defaulting customers. The plaintiffs, operators of competing centers, identified a violation of section 7 of the Clayton Act and sought treble damages under section 4 for the profits they would have made if the defaulting centers had discontinued operations. In holding that the plaintiffs had not suffered an antitrust injury, the Court stated:

> If the acquisitions here were unlawful, it is because they brought a "deep pocket" parent into a market

> of "pygmies." Yet [plaintiffs'] injury—the loss in income that would have accrued had the acquired centers gone bankrupt—bears no relationship to the size of either the acquiring company or its competitors. [Plaintiffs] would have suffered the identical "loss" —but no compensable injury—had the acquired centers instead obtained refinancing or been purchased by "shallow pocket" parents. . . .

429 U.S. at 487, 97 S.Ct. at 696. For similar reasons, Bayou's failure to acquire the Wilcox franchise does not constitute an antitrust injury. Bayou would have suffered the identical loss of sales, and economies of scale if Wilcox had retained his operation or if he had sold to a third party. The injury does not satisfy either prong of the *Brunswick* test; it is not the type of injury the antitrust laws were designed to prevent and it does not flow from that which ostensibly made the defendants' activities illegal.

Bayou's second and third assertions of antitrust injury relate to the defendants' alleged exclusionary conduct with respect to vending machines and shelf space. Bayou complains that LCC does not permit retail outlets to place Bayou's products in vending machines and coolers owned by LCC, and that LCC provides free maintenance service on machines and coolers owned by businesses if the machines and coolers are stocked only with LCC products. Without anything more, these practices are not barred by the antitrust laws. They are competitive acts. It ought to be apparent that "a monopolist's right to compete is not limited to actions undertaken with an altruistic purpose. Even monopolists must be allowed to do as well as they can with their business." *Northeastern Telephone Co. v. American Telephone & Telegraph Co.*, 651 F. 2d 76, 93 (2d Cir. 1981), *cert. denied*, 455 U.S. 943, 102

S.Ct. 1438, 71 L.Ed.2d 654 (1982). The shelf space argument also lacks merit. Stores allot shelf space to the bottlers in proportion to market activity. A bottler with a popular product is given a greater portion of available shelf space than a bottler with a product which has less sales appeal. When LCC acquired Wilcox's Dr Pepper operation, it received that product's share [2140] of the shelf space.[2] Bayou acknowledges that store owners apportion their shelf space on the basis of sales and that LCC has only that portion consistent with its total share of the soft drink market. But Bayou implies an antitrust injury and suggests an entitlement to more shelf space than its market share would justify. The district court correctly rejected this asserted antitrust injury.

Fourth, Bayou contends that the Wilcox acquisition enabled LCC to subject it to acts of predatory pricing. Specifically, Bayou complains that the defendants engaged in predatory pricing of Coca-Cola and Sprite in 32 ounce returnable bottles. This complaint does not withstand close scrutiny. Bayou first introduced 32 ounce returnable bottles of Pepsi-Cola and Seven-Up to the Lake Charles area. Bayou marketed these at a fifty cent discount per case and met with success. Later, LCC began marketing 32 ounce returnable bottles of Coca-Cola and Sprite at a one dollar discount per case. Bayou claims it was injured by this alleged predatory pricing.

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[2] For the purpose of the summary judgment motion, the parties stipulated to the following estimation of market shares. Prior to the Wilcox acquisition, LCC had in excess of 45 percent of the soft drink market; Wilcox's Dr Pepper operation had 30 percent; Bayou had 20 percent; and all remaining companies had less than 5 percent of the market. Following the Wilcox acquisition, LCC had in excess of 75 percent while the shares of the other companies remained substantially the same.

One seeking to establish predatory pricing must demonstrate that the defendant "at least sacrificed present revenues for the purpose of driving [the plaintiff] out of the market with the hope of recouping the losses through subsequent higher prices." *International Air Industries v. American Excelsior Co.*, 517 F.2d 714, 723 (5th Cir. 1975), *cert. denied,* 424 U.S. 943, 96 S.Ct. 1411, 47 L.Ed.2d 349 (1976). Generally, in order to prove that the defendant has sacrificed present revenues, it is necessary to establish that the defendant's prices were below marginal or average variable cost.

Bayou contends that to determine whether LCC priced below the average variable cost threshold, only the 32 ounce bottles should be considered. Both Bayou and LCC are full-line soft drink dealers, selling a variety of drinks in a variety of sizes. We conclude that the determination of the average variable cost in the wholesale soft drink industry, under the facts here presented, must take into consideration the full product line. We agree with our colleagues of the Ninth Circuit who, in a similar context reasoned that:

> . . . The pricing of one size at a predatory level would not necessarily drive out rivals who were selling a full line, as is the case in this industry, unless this placed the overall price of the line at the predatory level. . . .

Janich Bros., Inc. v. *American Distilling Co.,* 570 F.2d 848, 856 (9th Cir. 1977), *cert. denied,* 439 U.S. 829, 99 S.Ct. 103, 58 L.Ed.2d 122 (1978). Bayou has not alleged that LCC's pricing of the 32 ounce bottles of Coca-Cola and Sprite placed the overall price of LCC's line at the predatory level. Indeed, the record reflects otherwise.[3] Bayou's

[3] Considering LCC's entire soft drink line, during the years 1974 through 1977 LCC incurred average costs per case of $2.36, $2.79, $2.73, and $2.87, respectively, and received average revenues per case of $2.62, $3.18, $3.23, and $3.30, respectively.

claims concerning predatory pricing lack merit. Under the facts of this [2141] case, a finding of predatory pricing would "chill the very behavior the antitrust laws seek to promote." *Northeastern Telephone Co.* v. *American Telephone & Telegraph Co.*, 651 F.2d at 88.

In resolving that no antitrust injury resulted from the charged acts, we are mindful of the apparent difference in the compensable injury contemplated by sections 1 and 2 of the Sherman Act, particularly with reference to injuries flowing from attempted monopolization. *See Multiflex, Inc.* v. *Samuel Moore & Co.* Notwithstanding, we are persuaded that no cognizable antitrust injury is present in this case.

CONCLUSION

We have considered Bayou's other claims and find them to be without merit. Assuming that the defendants have violated sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act, Bayou has not shown, as it must show under *Brunswick*, that these violations resulted in a compensable antitrust injury. And, as relates to the alleged predatory and exclusionary practices, we perceive neither antitrust injury nor antitrust violation.

The district court's grant of summary judgment is AFFIRMED.

DECISION OF THE DISTRICT COURT

[543 F. Supp. 1255 (1982)]

BAYOU BOTTLING, INC.

v.

DR PEPPER COMPANY and Coca-Cola Bottling Co. of Lake Charles, Inc.

No. 790253.

United States District Court,

W. D. Louisiana,

Lake Charles Division.

July 15, 1982.

RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

VERNON, District Judge.

[1257] The plaintiff in this case, Bayou Bottling, Inc., (Bayou) has brought suit against defendants, Dr Pepper Company, (Dr Pepper) and Coca-Cola Bottling Co. of Lake Charles, Inc., (LCC), pursuant to §§ 4 and 16 of the Clayton Act (15 U.S.C. Sections 15, 26), charging the defendants with violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) and Section 7 of the Clayton Act (15 U.S.C. § 18) in the amount of $45,000,000.00, as well as court-ordered divestiture under 15 U.S.C. § 26. Following extensive discovery by both sides, the defendants have filed this motion for summary judgment, pursuant to Federal Rule of Civil Procedure 56(c), contending that there is no genuine issue as to any material fact,

and that the defendants are entitled to judgment as a matter of law. After hearing oral argument on this motion on April 29, 1982, the court took the matter under advisement and requested the submission by the parties of proposed findings of fact and conclusions of law. Having painstakingly considered the reams of memoranda submitted by the parties, in addition to the sometimes confusing but always artful argument of the distinguished counsel in this case, the court is now ready to rule.

This case is somewhat unusual, in that the defendants, hoping to once and for all slay the behemoth which this lawsuit has come to resemble, have chosen to concede many of the facts alleged by the plaintiff, for purposes of this motion only. Should the motion be denied, either in whole or in part, many (if not most) of the proposed findings of fact submitted by the plaintiff would become the subject of vehement dispute at trial. However, in urging their right to summary judgment, the defendants have assumed the position that Bayou Bottling cannot be entitled to judgment as a matter of law, even if all the facts alleged by the plaintiff were true.

The facts giving rise to this case had their genesis more than seven years ago, when the hands of time laid their steely grip on Mr. Lloyd Wilcox. Wilcox, owner of the local Dr Pepper bottling plant, was approaching retirement age and had decided to sell his operation. Two prospective buyers, LCC and Bayou, were waiting eagerly in the wings. The following facts relative to the events which later transpired are uncontested.

UNCONTESTED FACTS

1. *The parties*: Plaintiff, Bayou, is a Louisiana corporation with its principal place of business in Jennings, Louisiana. Bayou is in the business of wholesaling and

distributing soft drinks in the Lake Charles/Jennings area. Bayou carries several soft drink brands, of which the two biggest sellers [1258] are Pepsi-Cola and Seven-Up.[1] Bayou is now the sole owner (since 1975) of Central Bottling Corporation, which produces the bottled soft drinks distributed by Bayou. Bayou also owns six percent of the stock of Coastal Canning Corporation, a cooperative of Pepsi bottlers which produces Bayou's canned soft drinks. The current owners of Bayou purchased the business in December of 1976 for the price of $300,000.00, to be paid over a ten-year period. Bayou does business in the Western District of Louisiana.

Defendant Dr Pepper is a Colorado corporation with its principal place of business in Dallas, Texas. Dr Pepper is in the business of manufacturing soft drink "concentrate" for Dr Pepper and Sugar Free Dr Pepper soft drinks. Dr Pepper distributes its product by means of giving licenses, or franchises, to local bottlers, who use the concentrate in the manufacture of the finished product. Local bottlers set prices and determine marketing strategy, and are free to sell other brands, provided they are not classified as "imitators" of Dr Pepper. Dr Pepper does business in the Western District of Louisiana.

Defendant LCC is a Louisiana corporation with its principal place of business in Lake Charles, Louisiana. LCC, a licensee of the Coca-Cola Company and, since 1976, a licensee of defendant Dr Pepper, produces and sells sev-

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[1] Other brands Bayou sells are Diet Pepsi, Pepsi Lite, Mountain Dew, Sugar Free Seven-Up, Lipton's Iced Tea, Lipton's Diet Iced Tea, Nesbit Strawberry, NuGrape, Delaware Punch, Dad's Rootbeer, Sunkist Orange, Royale Chocolate, and County Time Lemonade. In addition, Bayou also sells Dr Pepper and other products in fountain syrup form.

eral soft drink brands in its franchise area.[2] LCC does business in the Western District of Louisiana.

2. *Relevant product and geographic markets*: For purposes of this motion, the parties agree that the relevant product market is that of "soft drinks"[3], and that the relevant geographic market is the area of southwest Louisiana encompassed by LCC's Dr Pepper franchise.

3. *Nature of the industry*: The soft drink industry makes extensive use of what is known as the franchise system. The captains of the industry are the manufacturers of the different flavor extracts which are also referred to as "syrups" or "concentrates." For example, the Coca-Cola Company, PepsiCo, Inc., Seven-Up Company and Dr Pepper license the use of their product names and sell their flavor extracts to bottlers under franchise agreements which give the franchisee the exclusive right to wholesale the soft drink in packaged form within a specific geographic area. The flavor extracts are also sold in fountain syrup form. Two of the parties in this case, LCC and Bayou, occupy the position of wholesalers, and they compete against each other, and with private label and warehouse brands, for sales to retailers.[4] Once sold

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[2] LCC sells Coca-Cola, Sprite, TAB, Fanta flavors, Fresca, Dr Pepper, Sugar Free Dr Pepper, Welch's flavors, Barq's Rootbeer and Nestea Iced Tea.

[3] For purposes of this motion, soft drinks are defined as non-alcoholic, non-dairy beverages for human consumption, which are manufactured by addition of a flavored extract to water (usually carbonated), and purchased by the retail customer in consumable form, predominately packaged in bottles or cans but also dispensed in non-packaged form.

[4] "Private labels" are soft drinks sold by grocery chains under their own trade name or the trade name of the organization from

(footnote continued)

to retailers, all brands compete against each other at the "shelf" level for consumer acceptance.

The parties agree that the wholesaling of soft drinks is a "high volume" operation. That is, costs of production and distribution [1259] may be reduced by a higher volume of output. Profits are increased by the "economies of scale" resulting from reduction of unit cost by increasing output without a comparable increase in production and distribution expenses.

It is a common practice for a wholesaler to hold franchises from more than one nationally advertised brand. Dr Pepper is, comparatively speaking, a smaller concentrate manufacturer than, for example, Coca-Cola or PepsiCo. In 1978, no bottling company in the United States produced only Dr Pepper, and only 30 bottling plants produced Dr Pepper as their primary product. As a result, Dr Pepper must seek out local bottlers of other brands who are willing to take on their product.

4. *The scenario prior to the sale of the Wilcox franchise*: In 1974, there were two Dr Pepper bottlers in southwest Louisiana: one owned by Mr. Clyde Johnson in Lafayette, the other owned by Wilcox in Lake Charles. Both men were approaching retirement age and, by February of

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(footnote continued)

which the retail grocer purchases. The soft drinks are manufactured by the grocery chains themselves or by contract bottlers or canners. Some of the better known private labels include Cragmont (Safeway), Chek (Winn-Dixie), Gayla (Topco), Yukon (A&P), 7-11 (Southland) and Big-K (Kroger). "Warehouse brands" are soft drinks that are sold through regional warehouses by the manufacturer and which bypass the more common method whereby the concentrate manufacturer sells to a bottler who manufactures the finished product and sells to retail outlets in his local area. The best known warehouse brand is Shasta.

1975, both had discussed the possibility of selling their franchises with Mr. Donald L. Antle, Vice-President, in charge of franchises for Dr Pepper. The parties agree that Wilcox was not, at this time, aggressively marketing his product, and that his plant was in need of substantial capital improvements. Nonetheless, there were two parties that were extremely interested in the acquisition of this ailing business, both of whom felt that they could breathe new life into it. These two prospective buyers were, of course, LCC and Bayou.

Wilcox and Johnson negotiated with both LCC and Bayou relative to the sale of their respective franchises, and it is also conceded that Mr. Antle took an active role in these negotiations. Both LCC and Bayou were interested in obtaining the Wilcox operation so as to increase their cost efficiencies, thereby bringing a concomitant increase in profits. As for Dr Pepper, the parties agree that this company was interested in having the franchises sold to the local Coca-Cola bottler.

Bayou's board of directors adopted a resolution formally declaring the corporation's intention to acquire the Wilcox operation. Bayou made an oral agreement with Wilcox to buy his business for a price of $1 million on April 23, 1975. Further discussions were had early in the day on April 25, 1975, but later that day Antle, Wilcox, and representatives of LCC confected a binding written agreement for the sale of Wilcox's business to LCC for $1 million. Although Antle preferred that Johnson also sell his franchise to the Coca-Cola bottler for the Lafayette area, Johnson had already accepted $100,000 in earnest money from the Lafayette Seven-Up/Pepsi bottler, Central (an affiliate of Bayou), and Johnson sold his business to them. The franchise was later assigned to Acadiana Bottling Company and approved by Dr Pepper.

As stated earlier, the policy of Dr Pepper favored the combination of Dr Pepper with Coca-Cola bottlers in southern Louisiana, and Mr. Antle encouraged both Wilcox and Johnson to sell their respective franchises to the Coca-Cola bottlers in their area. In the case of Wilcox's franchise, Antle had his wish; in the case of Johnson's franchise, he did not. In other words, the defendants concede for purposes of this motion that Dr Pepper encouraged Wilcox to sell to LCC and not to Bayou. However, the court finds that the plaintiff's proposed finding of fact that there was a conspiracy between Dr Pepper and LCC to prevent Bayou from acquiring the Wilcox franchise, directed at restraint of competition, to be merely conclusionary in nature. It is however, an undisputed fact that LCC's acquisition of the Wilcox franchise foreclosed Bayou from obtaining a Dr Pepper franchise for the same marketing area.

5. *Effects of LCC's acquisition of the Dr Pepper franchise on the relevant market*:

a. Bayou instituted a lawsuit in the Fourteenth Judicial District Court of Calcasieu Parish on May 23, 1975, seeking specific performance of the alleged contract of sale entered into with Wilcox on April 23, 1975. Since the pleadings admitted that no written agreement had been confected (and, [1260] indeed, counsel for the plaintiff admitted in oral argument that many of the terms of the sale were yet to be resolved), the state court dismissed Bayou's claim on September 26, 1975, finding that it was barred by the Louisiana Statute of Frauds. No appeal was taken, but LCC's acquisition of the franchise was held in abeyance pending the outcome of the litigation, until June 3, 1976.

b. For purposes of this motion, the defendants concede the validity of certain market share figures propounded

by the plaintiff. According to these figures, Wilcox's franchise enjoyed a 30% market share prior to the purchase by LCC; LCC enjoyed a market share of some 45-50%; Bayou claimed a mere 20% of the market, and all other remaining brands accounted for less than 5% of the market. Therefore, after the purchase of Wilcox's business, LCC's market share was between 75-80%, and Bayou's was 20%.

c. *Vending machines and coolers*: Defendants also concede for purposes of this motion that, subsequent to the acquisition, LCC outnumbered Bayou in vending machine sales by a ratio of 5 to 1. (Bayou's figures indicate that Bayou has 523 vending machines and 167 coolers, and that LCC has 2891 vending machines and 521 coolers.) It is also undisputed for our purposes today that LCC does not permit store owners to place Bayou's products in LCC-owned vending machines and coolers, and that LCC provides free maintenance service for store owners only when those machines are stocked exclusively with LCC products. Bayou also provides free vending machines to store owners.

d. *Shelf space*: The shelf space allocated to the different soft drink manufacturers is determined, ultimately, by the retail store owner or manager. However, soft drink suppliers are allowed to arrange their products themselves, subject only to the supervision of the store operator, and space is generally accorded each supplier based on the proportionate market share of their product. Therefore, it is conceded that LCC occupies 75-80% of the available shelf space in retail stores, and that Bayou obtains 20%.

e. *The Pepsi Challenge*: Both Bayou and LCC sell their soft drink products in a large number of packages, including 12-ounce cans and returnable and nonreturnable

bottles in the following sizes: 6½-ounce, 10-ounce, 16-ounce, 28-ounce, 32-ounce and 48-ounce. In 1973, Bayou Bottling was the first in the Lake Charles area to introduce the 32-ounce returnable/resealable bottle, offering a discount on such packages of Pepsi and Seven-Up of $0.50 off its normal wholesale price. In November of 1974 (prior to the acquisition by LCC of the Wilcox operation), defendant LCC introduced its own 32-ounce returnable/resealable package of its corresponding products, Coca-Cola and Sprite. Beginning in June, 1975, LCC offered these products at a discount of $1.00 per case in the Lake Charles marketing area. This discount remained in effect until January 3, 1977.[5]

f. *Mr.PiBB*: The concentrate for Mr. PiBB is manufactured by The Coca-Cola Company. In an attempt to obtain a franchise for a soft drink in the same "flavor category" as Dr Pepper, Bayou repeatedly applied for a franchise to distribute Mr. PiBB. The Coca-Cola Company refused Bayou's requests, on the ground that such franchises were only granted to Coca-Cola bottlers. LCC does not market Mr. PiBB in the Lake Charles area, because of its agreement with Dr Pepper not to sell another soft drink in the same flavor category as Dr Pepper. (Mr. PiBB is marketed by LCC in the Lafayette area, where they do not have a Dr Pepper franchise.) The national Coca-Cola Company is not a party to this suit.

g. *Dr. Nut*: In 1976, having been unable to obtain a franchise for either Dr Pepper or Mr. PiBB, Bayou's owners attempted to develop and sell their own entrant

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[5] On a full time basis, LCC's average total costs per case of soft drinks sold in its Lake Charles and Jennings marketing areas were $2.36 in 1974, $2.79 in 1975, $2.73 in 1976 and $2.87 in 1977. LCC's average revenues per case in those areas were $2.62 in 1974, $3.18 in 1975, $3.23 in 1976 and $3.30 in 1977.

[1261] in this flavor category: Dr. Nut. In April of 1978, Dr. Nut, Inc. reapplied for federal trademark registration. Dr. Nut, Inc., then filed a complaint in federal district court for the Western District of Louisana for damages incurred as a result of this opposition. The case was settled and dismissed. In 1981, sales of Dr. Nut were discontinued, and Dr. Nut, Inc., is now in the process of being wound up.

Based on the above undisputed facts, the court now makes the following

CONCLUSIONS OF LAW

1. *Propriety of granting the motion for summary judgment*:

The plaintiff in this case has offered argument in support of the proposition that summary judgment is particularly inappropriate in antitrust cases. However, as the plaintiff quite correctly states in its proposed findings of fact and conclusions of law:

> Summary judgment may be granted in antitrust cases, as in other cases, where there is no genuine issue of material fact and it is clear that the moving party is entitled to judgment as a matter of law. F.R.Civ.P. 56(c); *Aladdin Oil Co.* v. *Texaco, Inc.*, 603 F.2d 1107, 1111-1112 (5th Cir. 1979). Nevertheless, as pointed out in II Areeda & Truner, *Antitrust Law*, § 316 at 58:
>
> > Any discussion of summary judgment must, of course, recognize that it is often inappropriate. The Supreme Court said that it should be used sparingly in antitrust cases. And it is not a substitute for trial. All ambiguities and all reasonable inferences, it is frequently said, must be re-

> solved in favor of the party against whom summary judgment is sought. And it is also said that the claimant need not, at the outset, submit probative evidence in support of his position. The moving party has the burden of showing on the basis of admissible evidence, from persons with personal knowledge of the facts, that there is no genuine issue for trial as to any material fact.
>
> The authors go on to say that mere allegations in a complaint or defensive pleading are insufficient to resist summary judgment and that the party opposing the motion must offer probative evidence to support his claim.

In a recent case, *Southway Theatres, Inc.* v. *Georgia Theatre Co.*, 672 F.2d 485 (5th Cir. 1982), the Fifth Circuit provided an informative discussion on the standard for summary judgment in antitrust cases. It is proper for the court to make some assessment of the inferences that the plaintiff wishes to be drawn from the circumstantial evidence.

> The party opposing a motion for summary judgment is entitled to the benefit only of *reasonable* inferences that may be drawn in its favor. . . Some scrutiny is thus required to determine whether the facts are susceptible of the interpretation which Southway (the plaintiff) seeks to give them in light of the defendants' evidence contradicting Southway's allegations. . . .
>
> This court has previously described the proper extent of a court's assessment of the inferences in this matter:
>
> > insofar as any weighing of any inferences from given facts is permissible, the task of the court is not to weigh these against each other, but rather to cull the universe of possible inferences from facts established

> by weighing each against the abstract standard of reasonableness, casting aside those which do not meet it and focusing solely on those which do.
> (citations omitted)

See also, *In Re Municipal Bond Reporting Antitrust Lit.*, 672 F.2d 436 (5th Cir. 1982), and *Carlson Mach. Tools, Inc.* v. *American Tool, Inc.*, 678 F.2d 1253 (5th Cir. 1982).

This court has long been of the opinion that summary judgment should be used sparingly *in all cases,* and it is only with great caution and much soul-searching that such motions will be granted by this court.

2. *The court's analysis*: The court is now of the opinion that the lengthy history and [1262] heated debate engendered by this lawsuit are due to the fact that the opposing parties have diametrically opposed theories of this case. On the one hand, the plaintiffs are of the firm belief that their allegations, if proved, establish violations of the antitrust laws, and that they are therefore entitled to compensation for any and all injuries which would not have been suffered but for such alleged violations. The defendants, on the other hand, theorize that the antitrust laws are designed to afford redress for only certain kinds of injury, and, although the fortunes of plaintiff's business may have suffered through the success of defendant's operation, the antitrust laws afford plaintiff no right to relief, let alone relief in the magnanimous form of treble damages. In an effort to answer the plaintiff cries of both sides, the court will attempt to examine each allegation of anticompetitive conduct, determine its merit, and then address the question of whether the kind of injury alleged to flow from such conduct is within the protection of the antitrust laws. The court is by no means so naive as to believe that both sides will be satisfied with the result of its analysis, but it is hoped that plaintiff and defendants will

agree that the court has adequately considered, if not concurred with, their reasoning.

3. *The accumulation of franchises*: The major thrust of the plaintiff's argument seems to be that the acquisition by LCC of the Wilcox Dr Pepper franchise made LCC a monopolist in the soft drink industry in the Lake Charles marketing area, as evidenced by certain anticompetitive effects on such market. Bayou claims that the merger of the Dr Pepper franchise with LCC was anticompetitive because, had Bayou, rather than LCC acquired the franchise, the market shares of the two Lake Charles wholesalers would have been nearly equal, thereby fostering competition.

The accumulation of several exclusive franchises does not necessarily operate so as to restrain trade. The defendants suggest an analogy between this case and two Third Circuit decisions: *Lawlor* v. *National Screen Service Corporation*, 270 F.2d 146 (3rd Cir. 1959), and *Fleer Corp.* v. *Topps Chewing Gum, Inc.*, 658 F.2d 139 (3rd Cir. 1981).

In *Lawlor*, the plaintiff and the defendant were in the business of distributing advertising accessories to movie theatres. The defendant had acquired exclusive franchise agreements with the eight leading motion picture studios, giving them the sole distribution rights for all films produced by these studios. The court found no antitrust violation. The plaintiffs were free to compete for the acquisition of the exclusive franchises, when they became available, and there was no restraint of trade or reduction in supply due to the aggregation of several franchises by the defendant.

Similarly, in the *Fleer* case, the court found no unreasonable restraint of trade. The defendant Topps had an agreement with the Major League Baseball Players Association giving them the exclusive right to distribute bubble

gum with baseball cards depicting the various players. The court discussed the *Lawlor* case, above, noting:

> . . . This court held that an accumulation of exclusive licenses is not a violation of the Sherman Act because a rival film accessory distributor could always compete against National Screen for subsequent contracts with motion picture producers. Similarly, in our case, Fleer or any other trading card manufacturer, may compete with Topps for minor league players or even persuade the present major league players not to renew their Topps' contracts.

In keeping with this line of reasoning, the court found no antitrust violation because competition in the relevant product market (which the court identified as "pocket size pictures of active major league baseball players, sold alone or in combination with a low cost premium, at a price of 15 to 50 cents") was not foreclosed.

However, these two cases involve a characteristic not present in the instant lawsuit.

> In both cases, the licenses involved products which *do not compete against each other.* Hence their accumulation does [1263] not prevent a rival manufacturer from entering the market and does not operate as a restraint of trade.
>
> 658 F.2d at 150. (emphasis added)

For example, each motion picture involved in the *Lawlor* case used different accessories, not useful for the promotion of other films; each player's trading card in the *Fleer* case was distinct from every other's. A poster advertising Gone With the Wind does not compete with one advertising Star Wars, and a Ron Guidry baseball card does not compete with a Reggie Jackson baseball card.

Here, however, Dr Pepper, Coca-Cola, Sprite, Pepsi, and 7-Up all compete against each other for the consumer's taste buds. Therefore, the court feels that the reasoning of these two cases is not directly analogous to our situation.

Of much greater interest to the court is the case of *Top-All Varieties, Inc.* v. *Hallmark Cards, Inc.*, 301 F.Supp. 703 (S.D.N.Y. 1969). The plaintiff in that case owned a chain of retail stores, including one about to open in Tarrytown, N. Y. Hallmark entered into an agreement with another retail store in Tarrytown (Stationer's), to the effect that only Stationer's would be allowed to handle the Hallmark line. The court dismissed plaintiff's case for failure to state a claim upon which relief could be granted, stating that:

> While Hallmark is alleged to be the largest producer of greeting cards in the U. S., the complaint recognizes that there are other competing manufacturers who can supply Top-All with such products. It is alleged that Hallmark cards are the leading brand of greeting cards and that customers wishing to purchase them will take their business only to a store handling Hallmark products. But this does not make the exclusive distributorship invidious or unlawful.
>
> *There is no claim here that there is not a substantial market for the sale of cards produced by Hallmark's competitors. . . . Thus the plaintiff does not allege that interbrand competition is affected in any way by the Hallmark exclusive distributorship arrangements with Stationer's.*
>
> (emphasis added)

The court went on to distinguish the case at bar from that of *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959).

> The *Klor's* case involved a conspiracy between a large number of nationally known appliance manufacturers and distributors and Broadway-Hale Stores, a retail distributor of appliances and a competitor of Klor's, to refuse to sell to Klor's or to sell only at discriminatory prices. There are indications that Broadway-Hale extracted the agreement by use of its monopoly buying power. Thus the *Klor's* case involved a predatory conspiracy with both horizontal and vertical elements directed at a single competitor with the purpose of driving that competitor from the field by foreclosing all sources of supply.
> 301 F.Supp. at 705.

The conclusion of the court, therefore, is that the agreement between Dr Pepper and LCC to join hands against Bayou was not, standing alone, in restraint of trade or anticompetitive in effect. Though Bayou does not now compete on an equal footing with LCC, they do nonetheless compete. The retail store owner (and the consumer) is not hampered in his freedom to choose between LCC's products and Bayou's by the bare fact that LCC holds the Dr Pepper franchise. We will look, therefore, to the plaintiff's allegations of anticompetitive effects of the accumulation of the franchises, for the mere fact that they have been accumulated is insufficient to establish the plaintiff's right to recover.

4. *Anticompetitive effects*

a. In its first allegation of anticompetitive effects of the acquisition, the plaintiff cites:

> Foreclosure from marketing Dr Pepper, with resulting loss of the cost efficiencies Bayou Bottling would have derived from increased volume, loss of profit from increased past and future sales, including loss

of sales of Dr Pepper and loss of increased sales of its other brands due to the improved ability to price them more [1264] competitively. As to future sales, Bayou Bottling's claim may be expressed either in terms of discounted present value or loss of present capital value—i.e., difference in value of the business as it is versus what it would have been had the antitrust violations not occurred.

The question is whether Bayou's loss of business and cost efficiency due to LCC's acquisition of the Wilcox franchise indicates an anticompetitive effect of such acquisition. The defendants submit that this and other allegations of injury fail the test of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). Since the *Brunswick* case is so important to our decision today, the court finds it expedient to discuss it in some detail.

The defendant in that case was one of the two largest manufacturers of bowling equipment in the United States; the plaintiffs were three bowling centers owned by Treadway Companies, Inc. To combat increasing financial difficulties caused by a decline in the bowling industry, the defendant instituted the practice of acquiring operating defaulting bowling centers when their equipment could not be resold and a positive cash flow could be expected from operating the centers. The size of the defendant's operation increased, until they had over five times as many centers as their next largest competitor. The plaintiffs claimed that the acquisition in their market areas might substantially lessen competition or tend to create a monopoly in violation of § 7 of the Clayton Act, 15 U.S.C. § 18. Damages were sought pursuant to § 4, 15 U.S.C. § 15, for three times "the reasonably expectable profits to be made (by respondent/plaintiffs) from the operation

of their bowling centers." 429 U.S. at 481, 97 S.Ct. at 693.

The court stated the theory of the plaintiffs' case as follows:

> To establish a Section 7 violation, respondents sought to prove that, because of its size, petitioner had the capacity to lessen competition in the markets it entered by driving smaller competitors out of business. To establish damages, respondents attempted to show that had petitioner allowed the defaulting centers to close, respondents' profits would have increased.
>
> Intermeshing a statutory prohibition against acts that have a potential to cause certain harms with a damages action intended to remedy those harms is not without difficulty. Plainly, to recover damages respondents must prove more than that petitioner violated § 7, since such proof establishes only that injury may result. Respondents contend that the only additional element they need demonstrate is that they are in a worse position than they would have been had the petitioner not committed those acts. The Court of Appeals agreed, holding compensable any loss "causally linked" to "the mere presence of the violator in the market." [*NBO Industries, Treadway Co., Inc.* v. *Brunswick Corp.*] 523 F.2d [262], at 272-273 [(1975)]. Because this holding divorces antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so, we cannot agree with it.
>
> Every merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons. But Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects. Yet under the Court of Appeals' holding, once a merger is

found to violate § 7, all dislocations caused by the merger are actionable regardless of whether those dislocations have anything to do with the reason the merger was condemned. This holding would make § 4 recovery entirely fortuitous, and would authorize damages for losses which are of no concern to the antitrust laws.

Both of these consequences are well illustrated by the facts of this case. If the acquisitions here were unlawful, it is because they brought a "deep pocket" parent into a market of "pygmies." Yet [1265] respondents' injury—the loss of income that would have accrued had the acquired centers gone bankrupt—bears no relationship to the size of either the acquiring company or its competitors. Respondents would have suffered the identical "loss"—but no compensable injury—had the acquired centers instead obtained refinancing or been purchased by "shallow pocket" parents, as the Court of Appeals itself acknowledged, 523 F.2d, at 279. Thus, respondents' injury was not of "the type that the statute was intended to forestall."

But, the antitrust laws are not merely indifferent to the injury claimed here. At base, respondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for "the protection of competition, not competitors." It is inimical to the purposes of these laws to award damages for the type of injury claimed here.

Of course, Congress is free, if it desires to mandate damages awards for all dislocations caused by unlaw-

ful mergers despite the peculiar consequences of so doing. But because of these consequences, "we should insist upon a clear expression of a congressional purpose," before attributing such an intent to Congress. We can find no such expression in either the language or the legislative history of § 4. To the contrary, it is far from clear that the loss of windfall profits that would have accrued had the acquired centers failed even constitutes "injury" within the meaning of § 4. And it is quite clear that if respondents were injured, it was not "by reason of anything forbidden in the antitrust laws": while respondents' loss occurred "by reason of" the unlawful acquisitions, it did not occur "by reason of" that which made the acquisitions unlawful.

We therefore hold that for plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

(citations omitted, footnotes omitted)

429 U.S. at 486-489, 97 S.Ct. at 696.[6]

[6] It is with reluctance that the court has quoted so extensively from this case, but to have deleted a portion of the quotation would have resulted in failing to set forth a full explanation of the ruling in the case at bar.

Brunswick, therefore, established a bifurcated test for the allowance of damages in an antitrust action: 1) the injury must flow from that which makes the defendants' acts unlawful, *and* 2) the injury must be the type of injury that the antitrust laws were intended to prevent.

The plaintiff's first allegation of injury stems from its failure to acquire the Dr Pepper franchise. However, like the plaintiffs in the *Brunswick* case, Bayou would have suffered this injury no matter who acquired the franchise, or if it had not been sold at all. While no one denies that Bayou is in a less desirable position due to its inability to acquire Wilcox's business, this can only be described as a hazard of the marketplace, and not the type of injury the antitrust laws were designed to prevent. Neither facet of the *Brunswick* test is satisfied. First of all, Bayou's lost revenues do not flow from the fact that LCC holds such a large market share, but from the fact that they were unable to purchase the business in question. Secondly, these lost profits and cost efficiencies were not the type of injury the antitrust laws were designed to prevent. These laws were intended to protect [1266] competition, but to hold that this loss evidences an anticompetitive effect of the defendant's actions would be to protect competitors, not competition. And that we cannot do. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1961).

b. Bayou's next allegation of antitrust injury is stated as follows:

> Foreclosure from marketing other drinks in the same flavor category: the nationally advertised and promoted Mr. PiBB, or in the alternative Dr. Nut, with resulting losses in cost efficiencies, volume, sales, profits and capital value similar to those in subparagraph (a), and its expenses incurred in attempting to promote Dr. Nut.

The court finds that this claim of anticompetitive injury can be resolved without resort to antitrust law. With respect to the inability to obtain a franchise for Mr. PiBB, suffice to say here that all parties admit that the decision to grant franchises for this product only to Coca-Cola bottlers is a unilateral decision of the national Coca-Cola Company, which is not a party to this suit. Further, although it is apparent to the court that the failure of the attempt to promote Dr. Nut was in no way attributable to any anticompetitive conduct by the parties to this lawsuit, the court is precluded from considering this question by the principle of res judicata, since Bayou and Dr Pepper have already resolved this matter by means of settlement.

c. Bayou further alleges antitrust injury in the following manner:

> Lost sales, volume and profits from vending machines and coolers, as a result of LCC's market dominance in respect to these and LCC's acquisition of Dr Pepper, and of its enhanced power to exclude and actual exclusion of Bayou Bottling products from LCC-supplied vending machines and coolers, plus lost sales volume and profits generally as a result of the related effect on brand loyalty for Bayou Bottling's products vs. LCC's products.

"A monopolist may not take measures with the purpose of preventing effective competition; it may, however, aggressively compete in the marketplace." *Superturf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1280 (8th Cir. 1981).

These vending machines and coolers bear the trademark of the soft drink company that places them, and are used as a promotional tool by both LCC and Bayou. The fact that LCC excludes Bayou's products from its coolers cannot be said to be anticompetitive conduct. Rather the court views this as the expected result of healthy competition.

This is the only reasonable inference. Even a monopolist is allowed to meet competition by promoting its own product.

> Northeastern (the plaintiff) suggests that a monopolist's efforts in meeting competition are to be condemned unless they are intended to promote consumer welfare. While it is a fundamental tenet of antitrust law that customers will benefit from the salubrious effects of competition, a monopolist's right to compete is not limited to actions undertaken with an altruistic purpose. Even monopolists must be allowed to do as well as they can with their business.
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> *Northeastern Tel. Co.* v. *Am. Tel. & Tel. Co.*, 651 F.2d 76, 93 (2nd Cir. 1981), cert. denied, ... U.S. ...., 102 S.Ct. 1438, 71 L.Ed.2d 654 (1982), citing *Buffalo Courier-Express, Inc.* v. *Buffalo Evening News, Inc.*, 601 F.2d 48, 55 (2d Cir. 1979).

See also, *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979). In short, it cannot be said that the antitrust laws require LCC to assist Bayou in the promotion of their own product.

d. In their fourth allegation of antitrust damages, the plaintiff cites:

> Lost sales, volume and profits as a result of the LCC acquisition of Dr Pepper, its enhanced power and its exercise of that power in respect to shelf space, increased flexibility in promoting specific products on the shelf and related point of sale promotion.

[1267] Again, the allocation of shelf space by store managers in proportion to market share simply does not reflect an anticompetitive effect of the acquisition of the Dr Pepper franchise. The defendants have answered this charge with

a simple, common-sense analysis of the question, which is of great appeal to the court:

> Plaintiff's allegation with regard to shelf space is that LCC obtains 75 to 80 percent of the shelf space at retail outlets while Bayou obtains only 20 percent. Since these figures correspond to what Plaintiff claims are the two companies' market shares, LCC's advantage in shelf space is precisely what would be expected from non-predatory competition. Moreover, Bayou concedes that that shelf space decisions are ultimately made by the store managers themselves. Thus, Bayou appears to be saying not only that it is entitled to more shelf space than its sales warrant, but that LCC should somehow compel store managers to give preference to its competitor's wares. The antitrust laws compel no such result.

> e. The next antitrust injury alleged by plaintiff is: Lost sales, volume and profits as a result of LCC's predatory pricing and LCC's enhanced power to engage in predatory pricing due to its acquisition of Dr Pepper.

The court has carefully examined Bayou's claim of predatory pricing and has found it to be without merit. The court has first analyzed the facts concerning such claim as alleged by the plaintiff. First and foremost among them is the fact that the discounted 32-ounce returnable bottle was *first* introduced in the Lake Charles area by *Bayou.* Bayou admitted to having great success with this package. In response to this "challenge" from the Pepsi bottler, LCC then introduced its own 32-ounce bottle at an even lower price.

It seems to the court that this response by LCC typifies the aim of the antitrust laws. The consumer reaps the

benefit of lower prices when competitors vie for greater market shares in the age-old method of offering a comparable product at a lower cost. Plaintiff, on the other hand, contends that this pricing procedure was predatory in two respects: 1) that the effect of LCC's $1.00 per case discount was to put the price of these products below LCC's average variable cost; and 2) that the discount was discriminatory because it applied only in LCC's Lake Charles and Jennings marketing areas, not in its Lafayette marketing area.

The court is compelled to agree with the defendants that where, as here, both LCC and Bayou sell a full and widely varied line of soft drinks, in all forms of packages, it is appropriate, in determining whether an item is sold below average variable cost, to look to the average variable cost of the *entire line* of products, and not just the sale of Coke and Sprite in 32-ounce bottles. The prohibition against predatory pricing is meant to insure that the defendant has not "sacrificed present revenues for the purpose of driving (a competitor) out of the market with the hope of recouping the losses through subsequent higher prices." *International Air Ind., Inc.* v. *American Excelsior Co.,* 517 F.2d 714, 723 (5th Cir. 1975), reh. and reh. in banc den. October 8, 1975. However, active competition, including price rivalry, is to be encouraged.[7]

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[7] That legal standard, however, must be applied with a practical understanding of business realities. Even legitimate price decreases will necessarily have a non-remunerative effect upon other firms in the market. These decreases will reduce competitors' profit margins and they may drive the inefficient firm out of business while the firm which originally reduced prices continues to make a profit. It is the very nature of competition that the vigorous, efficient firm will drive out less efficient firms. This is not proscribed by the antitrust laws, "Antitrust legislation is concerned primarily

(footnote continued)

[1268] The court is well aware that the practice of fixing the price of certain items below cost as "loss leaders" serves the purpose of attracting customers and encourages the consumer to sample the product. This practice is readily distinguishable from that of a monopolist operating its business at a loss so as to drive a competitor from the marketplace, thereby enabling the monopolist to gouge the consumer with ever-higher prices, free from the restraints of competition.

The court adopts the reasoning of the Ninth Circuit in *Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), cert. den. 439 U.S. 829, 99 S.Ct. 103, 58 L.Ed.2d 122 (1978), wherein the court stated:

> . . . The pricing of one size at a predatory level would not necessarily drive out rivals who were selling a full line, as is the case in this industry, unless this placed the overall price of the line at the predatory level. Yet there was no evidence that the entire line was so priced for the years in question.

570 F.2d at 856.

Since the plaintiff has not alleged that the defendant LCC sold its entire line of products below their average variable cost, and since the price cut came in response to a discount offered by Bayou, the court is of the opinion

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(footnote continued)

with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise." . . . Thus we must exercise great care in differentiating between legitimate price competition and that "predatory pricing" which constitutes a restraint of trade.

Janich Bros., Inc. v. *American Distilling Co.*, 570 F.2d 848, 855-56 (9th Cir. 1977); see also *A. H. Cox & Co.* v. *Star Machinery Co.*, 653 F.2d 1302, 1307 (9th Cir. 1981).

that the only reasonable inference which may be drawn from the undisputed facts is that there has been no predatory pricing, but rather that the consumer benefit (albeit at Bayou's expense) from LCC's attempt to regain the share of the market lost to Bayou.

In any event, the claim of predatory pricing cannot scale the hurdle erected by *Brunswick, supra.* The fact is that the so-called predatory pricing began more than a year previous to LCC's acquisition of the Wilcox franchise. Therefore, it cannot be said that any injury to Bayou "flowed" from an antitrust violation.

f. Bayou's final allegation of antitrust injury is phrased as follows:

> Lost sales, volume, cost efficiencies, profit and ability to grow, market and promote existing and new products, due to the fact that Bayou Bottling must compete with a monopolist, particularly a monopolist which has a franchise extending into two marketing areas (both the Lake Charles marketing area and the Lafayette marketing area), has a "deep pocket" allowing it to spend whatever is necessary to counter any promotional activity Bayou Bottling may attempt, can afford the extra personnel to engage in various promotional activities and supply equipment to a degree with which Bayou Bottling cannot compete, and which has and exercises the power to perpetuate and exacerbate its large volume advantage and Bayou Bottling's corresponding unit cost disadvantage.

The court has scrutinized this allegation of injury and/or the anticompetitive effects of the Wilcox acquisition by LCC with a discerning eye. The gist of this (and the entirety of plaintiff's complaint) seems to be simple: LCC's gain is Bayou's loss. Bayou laments not only the fact

that they were unable to buy the Dr Pepper franchise; but also the fact that the franchise was acquired by their arch rival—LCC. It is the opinion of the court that this quixotic tilt at the windmill of competition demonstrates that the plaintiff is seeking relief which the antitrust laws simply are not designed to provide.

It cannot be gainsaid that:

> [f]rom the time of the seminal antitrust decision, *Standard Oil Co.* v. *United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911), only reasonable restraints of trade have been held to be proscribed by the Sherman Act.
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> *Sports Center, Inc.* v. *Riddell, Inc.*, 673 F.2d 786 (5th Cir. 1982), citing *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918).

Bayou has failed to demonstrate to this court any facts which could give rise to a [1269] reasonable inference that LCC's market dominance is the result of willful acquisition of monopoly power. Although it is unfortunate from Bayou's standpoint that there are more residents in the Lake Charles area who believe that "Coke is it" and/or choose to "be a Pepper" than those desirous of accepting the "Pepsi Challenge" or "feeling 7-Up," there has been no showing that the parties market shares are the product of price fixing and/or exclusion of competition by LCC, as opposed to a superior product and/or business acumen.

It is not the duty of this court to require store owners to accord greater shelf space to a less popular product, to force LCC to promote their competitor's wares in their own vending machines and coolers, to forbid the Dr Pepper

company from encouraging alignment with the most efficient bottler willing to purchase their franchise, to dictate the policy of the national Coca-Cola Company in the granting of its franchises, to underwrite the excursions into the marketplace of new products (Dr. Nut), or to prohibit LCC from underselling its competitors. In short the court is not obliged, under the facts of this case, to engage in affirmative action. In each request, Bayou asks the court to protect a competitor, not competition.

We find the record to be devoid of evidence of intent to bring about a monopoly. Monopoly is the power to fix prices and exclude competition. *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956). Competition is alive and well in the Lake Charles soft drink industry; the consumer is given a wide range of choices in selecting his desired beverage. The court cannot force him to choose a brand for which Bayou holds the franchise. The fact is that Bayou possesses the same market share as they did prior to the acquisition.

"Legitimate competition cannot anchor an antitrust action." *In Re Municipal Bond Reporting Antitrust Litigation*, 672 F.2d 436 (5th Cir. 1982). Bayou would have suffered the same lost revenues and cost efficiencies no matter who acquired the Dr Pepper franchise. Bayou's injuries do not flow from the fact that LCC has a greater market share; they flow from the fact that competition has precluded Bayou from achieving the position they desire. This is not the type of injury that the antitrust laws were designed to prevent, even if a violation of such laws were shown.

Many of the cases cited by the plaintiff involve suits brought by the government to enjoin the merger of businesses on the ground that such merger might operate so

as to restrain trade. However, this is a suit by a private plaintiff, and Section 4 of the Clayton Act is a *remedial* statute providing treble damages to any person "who shall be injured in his business or property by reason of anything in the antitrust laws." Therefore, the plaintiff must show actual injury attributable to something the antitrust laws were designed to prevent, as opposed to the burden in a Section 2 claim, which only requires a showing that such injury *might* result. *Brunswick* rejected the idea that mere violation of Section 7 of the Clayton Act gives rise to a damages claim under Section 4. *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 561-563, 101 S.Ct. 1923, 1926, 68 L.Ed.2d 442 (1980). Proof of antitrust injury is an essential element of the plaintiff's claim; absent such proof, plaintiff can claim no relief. There is no need to consider whether there were violations of the antitrust laws if there is no antitrust injury. *Purex Corp.* v. *Proctor & Gamble Co.*, 664 F.2d 1105 (9th Cir. 1981); *Cal. Computer Products* v. *Intern. Business Machines*, 613 F.2d 727 (9th Cir. 1979)[8]

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[8] Section 4 of the Clayton Act, 15 U.S.C. § 15, authorizing private antitrust suits for damages, provides in part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor. . . .

This statute confers standing to sue only upon those persons causally injured by antitrust violations. . . . Moreover, in order to prevail the plaintiff must prove not only injury causally linked to the asserted violation, but also that the injury is the type the antitrust laws were intended to prevent. . . . The plaintiff's burden of proving the former is satisfied by proof of *some* damage flowing from the antitrust violation. . . . Satisfying the latter burden is dependent on a showing that the injury was caused by a reduction, rather than an increase in competition flowing from the defendant's acts, since "[t]he antitrust laws . . . were enacted for 'the protection of

(footnote continued)

[1270] Since the court is able to dispose of this matter for the above stated reasons, the court finds it unnecessary to address the defendants' other defenses (particularly those which are peculiar to Dr Pepper alone), although the questions raised seem to the court to be meritorious.

(footnote continued)

competition not *competitors*,' ". . . Accordingly, the plaintiff must demonstrate that the defendant's conduct was intended to or did have some anticompetitive effect beyond his own loss of business or the market's loss of a competitor. . . . Moreover, it is not sufficient for an antitrust plaintiff to allege an indirect ripple effect. As this court wrote in *John Lenore & Co.* [v. *Olympia Brewing Co.*, 550 F.2d 495 (1977)]:

> It is not enough to confer standing that plaintiff just prove some injury and show that this injury is within the affected area of the economy. Antitrust violations admittedly create many foreseeable ripples of injury to individuals, but the law has not allowed all of these merely affected by the ripples to sue for treble damages.
>
> 550 F.2d at 489. (citations omitted, footnotes omitted).

Cal. Computer Products v. *Intern. Business Machines*, 613 F.2d 727, 732 (9th Cir. 1979).

The court went on to state at p. 735-36:

> There are three essential elements to a successful claim of Sec. 2 monopolization:
>
> a) the possession of monopoly power in the relevant market;
>
> b) the willful acquisition or maintenance of that power; and
>
> c) causal "antitrust" injury.
>
> There are four elements to a successful claim of Sec. 2 attempt to monopolize:
>
> a) specific intent to control prices or destroy competition with respect to a part of commerce;
>
> b) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose;
>
> c) a dangerous probability of success; and
>
> d) causal "antitrust" injury.

In conclusion, therefore, the court finds that the defendants' motions must be granted for the reason that the plaintiff has failed to provide any evidence from which a reasonable inference could be drawn that any injury causally related to an antitrust violation has been suffered by the plaintiff. Pretermitting the question of whether the acquisition of the Wilcox franchise by LCC might operate so as to restrain trade, this paper chase is nonetheless at an end, since the plaintiff is unable to establish the above stated essential element of its claim.

For the reasons above stated, the defendants' motion for summary judgment should be, and hereby is GRANTED.

JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 82-3516

D. C. Docket No. CA-79-0253

BAYOU BOTTLING, INC.,
Plaintiff-Appellant,

versus

DR. PEPPER COMPANY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

Before CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

February 21, 1984

ISSUED AS MANDATE: APR - 2 1984

JUDGMENT OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

BAYOU BOTTLING, INC.	:	
	:	
vs.	:	Civil Action
	:	No. 790253
DR PEPPER COMPANY and	:	
COCA-COLA BOTTLING CO. OF	:	
LAKE CHARLES, INC.	:	

JUDGMENT

For written reasons assigned on this date,

IT IS ORDERED, ADJUDGED AND DECREED that the defendants' Motion for Summary Judgment be and it is hereby GRANTED.

SIGNED in Chambers at Lake Charles, Louisiana, this 15th day of July, 1982.

/s/ *Earl E. Veron*
Earl E. Veron
United States District Judge
(Entered 7-20-82)

ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3516

BAYOU BOTTLING, INC.,

Plaintiff-Appellant,

versus

DR PEPPER COMPANY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion February 21, 1984, 5 Cir., 198.., ... F.2d ....)
(March 21, 1984)

Before CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

PER CURIAM:

(✔) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

* * *

ENTERED FOR THE COURT:

/s/ *Henry A. Politz*
United States Circuit Judge

AFFIDAVIT OF FRED B. TRAHAN

[Exhibits omitted]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

BAYOU BOTTLING, INC., a Louisiana corporation,
Plaintiff,

vs. AFFIDAVIT

DR PEPPER COMPANY, a Colorado corporation, and COCA-COLA BOTTLING CO. OF LAKE CHARLES, INC., a Louisiana corporation,
Defendants.

Case No. 790-253

STATE OF LOUISIANA)
) SS.
PARISH OF CALCASIEU)

Fred B. Trahan, being first duly sworn avers as follows:

1. I am Fred B. Trahan and reside at 703 Alice Street, Jennings, Louisiana. I was born May 5, 1930, graduated from Iowa High School in 1947 and attended McNeese College for two years. I am president and general manager of the plaintiff Bayou Bottling, Inc. ("Bayou Bottling"). I have been employed by Bayou Bottling for 21 years and have been its general manager for 12 years, in which capacity I have overseen the bottling phase of the business, purchases, advertising, distribution and sales

and the general business operations of the company. Bayou Bottling is a member of the National Soft Drink Association, and throughout my employment by Bayou Bottling I have regularly attended the annual seminars and conventions sponsored by that association and I have also attended several times per year the meetings of the associations of the franchisees of various soft drink brands which Bayou Bottling has bottled, such as the Pepsi-Cola Bottlers Association and the 7-Up Bottlers Association. I have also been in virtually constant contact during the past 20 years with other soft drink bottlers who have franchises from the nationally advertised soft drink companies (such as Coca-Cola, Pepsi-Cola, Dr Pepper and 7-Up), so that I have very extensive knowledge of and experience in the soft drink business. I make this affidavit based upon my personal knowledge. Each opinion expressed by me in this affidavit is given to a reasonable degree of certainty, and is based upon my personal knowledge and my experience and background as a soft drink bottler and wholesaler.

2. The term "Soft Drinks" is accurately defined as: *non-alcoholic, non-dairy beverages for human consumption, which are manufactured by addition of a flavored extract to water (usually carbonated), and purchased by the retail customer in consumable form, predominantly packaged in bottles or cans but also dispensed in non-packaged form.* It may be argued that powders or dry-mix drinks (such as Kool-Aid) should be included within the above definition, but in fact those powders play no significant role at all in the soft drink market and further, the pricing of soft drinks (as defined by the italicized words above) is not, as a matter of commercial reality, influenced by or sensitive to the pricing of powders such as Kool-Aid. Even if such products were included in the definition of "soft drinks", they would constitute an

insignificant percentage of the market. The above definition is also intended to exclude beverages such as fruit juices (whether natural, frozen or reconstituted), dairy products, coffee, tea and alcoholic drinks because the commercial reality and pattern of trade in the soft drink industry is such that changes in prices of those beverages do not produce changes in the prices of soft drinks as defined above. The normal, actual pattern of trade and commercial reality are that the beverages included within the above definition of soft drinks are plainly an identifiable product market, in which the pricing of soft drinks, as thus defined, is principally (and, for practical purposes, exclusively) sensitive to the pricing and changes in price of other soft drinks as thus defined, and not in any significant degree sensitive to or influenced by the pricing of beverages excluded by that definition. Customer buying habits and general public recognition confirm that "soft drinks" as defined above constitutes a relevant product market.

3. A geographic area of effective competition in which Bayou Bottling or any other soft drink bottler and wholesaler operates is the geographic area established by his franchise. It is a matter of common practice in the industry that when one adds a new franchise to franchises for brands he is already bottling and wholesaling, the geographic boundaries of that new franchise are modified to correspond with the boundaries of his existing franchises so that he (and neighboring franchisees) will be wholesaling all of their soft drinks within substantially the same area. Attached as Exhibit A is testimony from the April 18, 1979 deposition of Donald L. Antle, Vice-President in charge of franchises, Dr Pepper Company, confirming this. See also Exhibit —— hereto and discussion at para. —— below.

4. Attached as Exhibit B is a map of Bayou Bottling's franchise territory for its 7-Up franchise. Attached as Exhibit C is a copy of Bayou Bottling's 7-Up franchise agreement, which is a standard form of franchise agreement. Attached as Exhibit D is a map of Bayou Bottling's franchise territory for its Pepsi-Cola franchise. Attached as Exhibit E is a map of the franchise areas of the defendant Coca-Cola Bottling Co. of Lake Charles, Inc. ("LCC"), which was marked during depositions of LCC officers as plaintiff's Exhibit 49. In respect to that exhibit, LCC now markets Dr Pepper, Coca-Cola and other soft drink products (but not Mr. Pibb) in the "Lake Charles Marketing Area" which includes the Lake Charles and Jennings areas shown on that map, and also markets Coca-Cola, Mr. Pibb and other soft drinks (but not Dr Pepper) in the adjoining marketing area known as the "Lafayette Marketing Area". Dr Pepper is marketed in the Lafayette Marketing Area by another bottler, Acadiana Bottling Company owned and operated by Mr. Alvin ("Fraz") Smith. Attached as Exhibit F is a map showing Bayou Bottling's Pepsi-Cola franchise area (which is substantially co-extensive with its 7-Up franchise boundaries), in which the shaded area sets forth the geographic boundaries of LCC's Dr Pepper franchise (after portions of the Wilcox franchise area were sold off to another bottler by LCC so as to render their respective franchise territories co-extensive). The shaded area in Exhibit F contains well over 80% of the total population of Bayou Bottling's franchise area.

5. Within the Lake Charles Marketing Area, Bayou Bottling has its principal bottling facility, distribution center and office in Jennings, and a distribution center and office in Lake Charles. LCC has its principal bottling facility, distribution center and office in Lake Charles and a distribution center and office in Jennings. LCC

has another bottling plant, distribution center and office in Lafayette to service the Lafayette Marketing Area. As of the beginning of 1975, the physical process of bottling soft drink products wholesaled by Bayou Bottling was done by a cooperative bottling facility known as Central Bottling Corporation, 50% of the stock of which was owned by Bayou Bottling and 50% was owned by Alvin Smith, the 7-Up and Pepsi-Cola franchisee in the Lafayette Marketing Area. The Pepsi-Cola franchise under which Bayou Bottling (and Mr. Smith) operated covered both marketing areas and was held in the name of Central Bottling Corporation, but with the knowledge and consent of Pepsi-Cola Company was shared by Bayou Bottling (for its Lake Charles Marketing Area) and Smith (for the Lafayette Marketing Area), so that Bayou Bottling was in fact the franchisee for the Lake Charles Marketing Area. All of Bayou Bottling's other franchises always were and are held in the name of Bayou Bottling. In respect to its 7-Up, Pepsi-Cola and other franchises, Bayou Bottling (formerly known as the 7-Up and Pepsi-Cola Bottling Co. of Jennings, Inc.), was and is the corporate entity which at all relevant times has conducted and continues to conduct all of the business operations normally conducted by a soft drink franchisee, including particularly but without limitation all wholesaling, distribution, advertising and promotion of soft drinks in its franchise area, except for the physical process of packaging the soft drinks into bottles and cans. As to that packaging process, Bayou Bottling has had the bottling done by Central Bottling Corporation and has had its canning done by another cooperative facility, Coastal Canning Company. Ultimately, when Mr. Smith in 1975 obtained the Dr Pepper franchise for the Lafayette Marketing Area, his 50% ownership of Central Bottling was redeemed by Central Bottling, leaving Bayou Bottling as Central's sole owner, and Central has since remained a

wholly-owned subsidiary and division of Bayou Bottling. Pepsico, Inc., the franchisor of Pepsi-Cola, on the occasion of the transaction just referred to, insisted on the name change of its bottler from "Seven-Up and Pepsi-Cola Company of Jennings, Inc." so that the brand name Pepsi Cola would not be publicly combined with another brand name, Seven-Up. That was the reason for the plaintiff's name change to "Bayou Bottling, Inc." This is confirmed by Exhibit G hereto.

6. Attached hereto as Exhibit H is the combined answer of Bayou Bottling, Inc. to interrogatories 39 and 40 of the defendant Dr Pepper Co., setting forth the sequence of events whereby Bayou Bottling was foreclosed by the concerted action of Dr Pepper Company and LCC in 1975 from obtaining the Dr Pepper franchise for the Lake Charles Marketing Area. Prior to and in April 1975 that franchise was held by Lake Charles Dr Pepper Company, Inc. (owned and operated by Mr. Lloyd S. Wilcox.) I personally participated in each of the facts and events referred to in Exhibit H, and the recitation of facts and events therein is absolutely true and correct to my personal knowledge.

7. As of late 1974 and the beginning of 1975, there were, for practical purposes, only three suppliers of soft drinks at the wholesale level in the Lake Charles Marketing Area: LCC, by far the dominant firm with close to 50% of the market, Dr Pepper, with approximately 30% of the market and Bayou Bottling with 20% of the market. Although it is true there were house brands and occasional sales by other suppliers (located outside the market but from time to time shipping product into the Lake Charles), none of those house brand or other suppliers had anything approaching market-wide distribution and their presence in and effect upon the soft drink market was insignificant. Because LCC was so much larger than the other two whole-

salers in the Lake Charles Marketing Area (Wilcox's Dr Pepper business and Bayou Bottling), we were fully aware that our prices were substantially dictated by what LCC set as its prices. Soft drink wholesaling is a "high volume" business. Production and distribution require a substantial investment by bottlers in manufacturing facilities and distribution equipment. The Donald Antle affidavit filed in this case (para. 4), and the answers of both defendants to Plaintiff's Interrogatory 3 confirm this (Kersten Exhibits H and J). Accordingly, there are substantial economies of scale, and the scale or volume of wholesaling by LCC in the Lake Charles Marketing Area was so much greater than Bayou Bottling's volume (and LCC's unit cost advantage therefore so great) that Bayou Bottling had great difficulty attempting to compete with LCC and could not supply any consistent, competitive price pressure upon LCC because Bayou Bottling's unit costs were greater (due to LCC's volume advantage and our corresponding volume disadvantage). Competition in the Lake Charles Marketing Area was also less than vigorous because the number two wholesaler (Wilcox's Dr Pepper business) was not an aggressive and efficient bottler and wholesaler. Even though Dr Pepper was a very popular soft drink nationally, and particularly in the South, including the Lake Charles Marketing Area, where it held a strong number two position in market share in (30% versus LCC's 50%), it was not being promoted by Wilcox nearly as effectively as it could have been and Wilcox had even allowed his bottling and distribution facilities to become somewhat run down and obsolete (although much of them was perfectly fine and usable). LCC also dominated shelf space in retail stores. In that connection, soft drinks are generally bought by consumers on impulse and are not generally considered a "necessity" grocery item. In the Lake Charles Marketing Area, LCC was frequently able

to take more than 50% of the shelf space, in grocery stores and other retail outlets. The remaining portion of the shelf space would be split between our products and Wilcox's Dr Pepper products. LCC also had a great numerical advantage over both Bayou Bottling and Wilcox's Dr Pepper business in the number of vendors in operation in the market. Relative to that, customer loyalty or brand loyalty, is a well recognized phenomenon in the soft drink business. That is, a relatively high percentage of soft drink consumers habitually purchases one brand of soft drinks rather than another. Attached hereto as Exhibit I (see esp. pp. 13-16, 19-20) are the testimony of Dr Pepper Vice-President Antle, confirming this fact (and discussing also the importance of shelf space and widespread availability of soft drinks.) With its big advantage in vending machines, LCC's products were available to consumers in a far greater variety of locations than were other soft drinks. This not only in itself tended to increase LCC's percentage of total sales of soft drinks in the market, but also tended to increase customer or brand loyalty to LCC products and decrease that loyalty to ours, and thereby ultimately to impair our sales in retail outlets, fountain sales and all other sales.

8. As of November 1974, I and the other officers of Bayou Bottling desired to purchase Wilcox's Dr Pepper operation to improve our competitive position. In that month, an event occurred which prompted us to take concrete action toward that objective: Bayou Bottling's Lake Charles warehouse burned down, and we determined we should acquire the Wilcox Dr Pepper facilities not only to obtain the Dr Pepper franchise but also so that we would have his bottling plant and other facilities immediately available. Attached hereto as Exhibit J is a true copy of the November 11, 1974 minutes of a meeting of the

Board of Directors of Bayou Bottling (then known as 7-Up and Pepsi-Cola Bottling Co. of Jennings, Inc.), in which Walter L. Morgan (then president of Bayou Bottling) and I were authorized and empowered to acquire on behalf of Bayou Bottling Mr. Wilcox's Dr Pepper franchise, buildings and property, for a price not to exceed $1,500,000.*

9. As of that time, Bayou Bottling had for over 25 years been established as a soft drink bottler and wholesaler, and of course was actively in that business as the franchisee of two national companies (7-Up and Pepsi-Cola), and of other companies. It had in the past added brands to its product line and was fully capable of adding Dr Pepper. As set forth in the affidavit of Walter L. Morgan which accompanies this affidavit, and to my personal knowledge, the Morgan family (of which I am a member,

* I and the other officers of Bayou Bottling also became aware that the Dr Pepper franchise for the Lafayette Marketing Area was also for sale, and that the 7-Up/Pepsi franchisee for that area, Alvin Smith, wanted to obtain that franchise. It happened that Mr. Smith and the then owner of the Lafayette Dr Pepper franchise, Mr. Johnson, had a personal dislike for one another and therefore could not communicate with one another to negotiate a sale. For that reason, Walter Morgan negotiated with Mr. Johnson, though all parties understood that the Lafayette Dr Pepper franchise would ultimately be sold to Mr. Smith. It was further understood by Mr. Smith and Mr. Morgan that, thereafter, Mr. Smith would no longer need any bottling facilities provided by Central because the Lafayette Dr Pepper bottling plant would suffice for all of Mr. Smith's soft drink bottling. Therefore, it was intended that after Smith purchased the Lafayette Dr Pepper franchise and bottling facilities, Central would redeem his half of the Central stock, leaving Bayou Bottling as sole owner of Central. It was Bayou Bottling's intention in 1975 thereupon to integrate fully its bottling and distribution facilities, as well as the Wilcox bottling and distribution facilities all into the Bayou Bottling corporate entity, and to operate thereafter as a fully integrated enterprise.

by marriage), various business interests which they own or control and Bayou Bottling itself had ample resources with which to consummate the purchase, upgrade and modernize such equipment within the Wilcox bottling operation as was necessary and fully integrate the Wilcox Dr Pepper business with Bayou Bottling's own soft drink business. Attached hereto as Exhibit K is the deposition testimony of Dr Pepper Vice-President Antle, confirming that it is probable that, if LCC had not acquired Wilcox's Dr Pepper franchise, Bayou Bottling would have, as long as (a) Bayou Bottling had the financial capacity (which it clearly did as set forth above and in the Morgan affidavit), and (b) Bayou Bottling's quality control standards were adequate. As to quality control, our facilities, like those of all franchisees, were regularly inspected and approved by two national companies (7-Up and Pepsi), Mr. Antle personally told me in April 1975 our facilities were satisfactory in that respect and Bayou Bottling in fact routinely ranked high in comparison with its fellow franchisees in the rating of its quality control (see, e.g., a recent ranking of Pepsi bottlers as set forth in Exhibit L, attached hereto.) Further, our canning was done by a cooperative facility (Coastal Canning) which also canned and continues to can Dr Pepper for some of its owner/clients, including Acadiana (Mr. Smith's Dr Pepper business). Therefore, it is fair to say that our quality control plainly was sufficient to qualify as a Dr Pepper bottler.

10. During the time of the negotiations between Bayou Bottling and Wilcox, our accountant, Mr. Lloyd Orgeron, and I calculated certain economies of scale and cost efficiencies which would be achieved by integrating Wilcox's Dr Pepper franchise and bottling and distribution facilities into Bayou Bottling. Duplicate copies of that calculation are contained both in the working papers of the ac-

counting firm Norton & Orgeron (produced as one of the exhibits in this litigation) and in the Bayou Bottling files (also produced as exhibits in this litigation), and a true copy thereof is attached hereto as Exhibit M. As shown on this exhibit, we calculated that we could achieve a savings even at the outset of $114,544 per year. We realized, of course, that this was in effect a minimum savings, inasmuch as we felt very confident our overall sales would increase because, by the Dr Pepper acquisition, we would be able to compete on a reasonably effective basis with LCC. In addition, of course, by having approximately 50% of the market we would be improving our shelf space position and with the increased revenues, cost efficiencies, wider distribution of product and the other advantages obtained by the Dr Pepper acquisition, I am absolutely certain overall competition in the Lake Charles Marketing Area would have been greatly increased.

11. Attached hereto as Exhibit N are excerpts from the April 18, 1979 deposition of Donald L. Antle, Vice-President of franchises for the Dr Pepper Company, in which he confirms that he was seeking in early February 1965 to place the Dr Pepper franchises in Southern Louisiana in the hands of the Coca-Cola bottlers, and that he made Lloyd Wilcox aware of that on a substantially continuous basis throughout the time of his contacts with Wilcox in the first quarter of 1975 up to the time Wilcox sold his business to LCC.

12. Attached hereto as Exhibit O are excerpts from the diary of Dr Pepper's vice-president in charge of franchises, Mr. Donald L. Antle, produced and identified during his deposition in this litigation. As disclosed therein, Mr. Antle was actively and consciously seeking to merge the Dr Pepper and Coca-Cola franchises both in Lafayette

and in Lake Charles into LCC, rather than have those Dr Pepper franchises acquired by the other potential purchasers (Alvin Smith in Lafayette and Bayou Bottling in Lake Charles.) These diaries also confirm Dr Pepper's realization that in the Lake Charles Marketing Area ". . . Dr Pepper is in a strong number two position in Lake Charles with Coke being number one." (September 5, 1974 note) Most of the contacts between Antle of Dr Pepper and LCC were initiated by Antle (see notes generally from August 1974 through April 1975). They confirm (February 6, 1975 note) that Antle "Advised [Wilcox] that [the Dr Pepper Company] would prefer if he's ready to sell that we go to Coca-Cola . . ." Antle at that point told Wilcox he would be coming to Lake Charles to "work with Lake Charles Coca-Cola." From and after February 1975 Antle's contacts to try to arrange a merger between Wilcox's Dr Pepper business and LCC are substantially continuous. As also disclosed in the Antle diary, Dr Pepper Company's program was to ". . . put Dr Pepper and Coca-Cola together in Southern Louisiana." (February 18, 1975 diary entry). The February 20, 1975 diary entry indicates Wilcox wanted only $900,000 for his corporation, as stated below, we ultimately offered him, and he accepted, a total of $1 million). Antle's April 11, 1975 diary shows Wilcox reported to Antle that Bayou Bottling indicated they were willing to meet Wilcox's price of $900,000 and that Wilcox also got ". . . the feeling they would go higher if needed. They needed his building and facilities, as their warehouse recently burned in Lake Charles." Although Antle states in his diary that Wilcox did not particularly care to sell to Bayou Bottling, he confirmed Wilcox "will take the highest offer." Antle then records that he "*Suggested [Wilcox] wait until the middle part of next week, when [Antle] gets a chance to personally contact him before*

making any commitments to Pepsi-Cola. Further advised [Wilcox] that [Dr. Pepper Company] still wanted to work with Coca-Cola if at all possible." The April 15, 1975 entries in the Antle diary show Antle was increasingly aware of Bayou Bottling's efforts to purchase the Dr Pepper business and that Antle was stalling them in order to enhance the opportunity for LCC to make the acquisition: *"My purpose for delaying the Lake Charles contact is to allow Coca-Cola some more time to get his Board of Directors together and approve the pursuit of the acquisition of Dr Pepper in Lake Charles and Lafayette."* The April 21, 1975 entries indicate Antle's efforts to arrange for LCC's acquisition of the Wilcox Dr Pepper business were delayed by the illness of LCC's then President Paul La-Croix, so that Antle then *"arranged to meet with Lloyd Wilcox on Tuesday evening [April 22] to further discuss his price and terms and the type of package he would like for me to offer Coca-Cola."* Antle's April 22, 1975 diary note indicates LCC was offering Wilcox a package of approximately $860,000 whereas at that point Bayou Bottling was offering Wilcox over $900,000 and in fact, the following day, offered Wilcox $1 million, which Wilcox accepted. Attached hereto as Exhibit P is Antle's deposition testimony relating to these diary entries.

13. According to his diary, on Wednesday, April 23 Antle arranged with LCC to make a proposition to Wilcox by Friday of that week, April 25th. Antle also met with Mr. Morgan and me on that date, and said we should talk the following week (April 30) further about possible acquisition of Dr Pepper. (It was later on April 23, 1975 that Mr. Morgan and I met with Wilcox and made our agreement to purchase his Dr Pepper business, as set forth accurately in Exhibit H hereto and in paragraph 17 below.)

14. Antle's April 25, 1975 diary note shows that even though Antle was advised of the purchase agreement for the Lafayette Dr Pepper franchise, confirmed by earnest money of $100,000 paid to the Dr Pepper franchise seller, Antle wanted to try to block that sale and ". . . still wanted to meet with [the seller], his attorney and Coca-Cola representatives next week to determine if we could still sell to Coca-Cola."

15. Antle's April 28, 1975 diary note confirmed Bayou Bottling's contemporaneous understanding that it "had a verbal contract with [Wilcox, for the purchase of Wilcox's Dr Pepper business] and plan to enforce that contract."

16. Antle's objective of merging all Dr Pepper franchises into the Coca-Cola franchises is further demonstrated by his April 29, 1975 diary note in which even at that late date he was trying to block the sale of the Lafayette Dr Pepper business to the Pepsi Bottler there and have it acquired instead by LCC.

17. As of April 23, 1975, we at Bayou Bottling, of course, had been unaware of Dr Pepper Company's efforts to effect acquisition of Wilcox's Dr. Pepper franchise by LCC instead of us. As set forth in Exhibit H, Bayou Bottling (through Walter Morgan and me) and Mr. Wilcox reached an oral agreement on April 23, 1975 whereby Bayou Bottling would purchase Mr. Wilcox's entire Dr Pepper bottling business for the total amount of $1 million. Attached hereto as Exhibit Q is a true copy of the document I utilized in that April 23, 1975 meeting with Wilcox wherein we negotiated and reached agreement upon the sale of his Dr Pepper business at that price. Just before agreement was reached, as reflected on Exhibit Q, we had reached the total offer $960,000, which Wilcox asked us ultimately to make an even $1 million, which we did.

As set forth in Exhibit Q, it was expressly agreed that the total dollar amount of the payment, including all interest, was to be an even $1 million. It was for that reason that I added onto the document attached hereto as Exhibit Q, the language (which I was addressing to our accountant, Mr. Orgeron), to "add $40,000 round off to a flat million dollars if interest brings above this reduced cost somewhere." That was the deal which we made and which Wilcox agreed to.

18. When, as reflected in Exhibit H, Wilcox reneged on his agreement to sell us his Dr Pepper business, Bayou Bottling immediately sent a telegram (attached as Exhibit R) to the president of Dr Pepper Company in Dallas. Dr Pepper refused to meet with us at that time. Our company (by its President Walter Morgan) later asked Dr Pepper President Clements for a meeting by a letter dated August 15, 1975 (Exhibit S hereto) but Mr. Clements refused to meet with us (see Exhibit T).

19. Also, shortly after Mr. Wilcox's refusal to perform upon his agreement, we sought to enforce the agreement by commencing an action in a State of Louisiana District Court for specific performance of that agreement. However, the court held that because the agreement was not in writing, it was not enforceable if Mr. Wilcox denied the agreement under oath (which he did) and judgment was therefore entered dismissing our case, a copy of which judgment is attached hereto as Exhibit U.

20. Attached hereto as Exhibit V, from LCC's business records, is a copy of the handwritten agreement of April 25, 1975 reached at the meeting arranged by Dr Pepper Vice President Antle, among himself, LCC officers (including Sadler) and Wilcox, whereby Wilcox sold his Dr Pepper business to LCC. Attached as Exhibit W is the depo-

sition testimony of LCC's President (then vice-president) Sadler describing that April 25, 1975 meeting. Attached as Exhibit X is the testimony of LCC's then President Paul LaCroix showing the meeting was held even though he was not present (due to his illness) and was not even advised of it. Attached as Exhibit Y is the testimony of LCC Treasurer Gaithe relating to that April 25, 1975 meeting. Attached hereto as Exhibit Z are a number of documents from the Dr Pepper Company files relating to that sale, showing that (a) LCC planned to proceed with the purchase notwithstanding Bayou Bottling's objection (Shaddock April 30, 1975); (b) Wilcox would proceed ahead if LCC indemnified him against loss to Bayou Bottling (May 28, 1975 Memo); (c) As soon as Bayou Bottling's agreement was held unenforceable for lack of a writing LCC and Dr Pepper proceeded with the change in franchise ownership (Sept. 30, 1975 memo, October 2, 1975, franchise application and Dr Pepper Company's October 7, 1975 approval); (d) arrangements were made among neighboring Coca-Cola bottlers to rearrange Dr Pepper franchise boundaries so that each one's Dr Pepper territory would be coextensive with his Coca-Cola territory (January 9, March 26 and April 5 memos). Attached as Exhibit AA, from LCC's business records, are a June 3, 1976 letter and attached documents setting forth the final Dr Pepper franchise agreement with LCC and the documentation of the merger of Wilcox's Dr Pepper business into LCC.

21. Bayou Bottling thereupon sought to obtain another nationally advertised brand in the same flavor category as Dr Pepper, namely Mr. Pibb, the extract for which is manufactured by the Coca-Cola Company of Atlanta, Georgia. On behaif of Bayou Bottling Company I wrote the Coca-Cola Company the October 29, 1975 letter at-

tached hereto as Exhibit BB. The Coca-Cola Company refused to give us the Mr. Pibb franchise by its letter of October 31, 1975, attached hereto as Exhibit CC. On each of three subsequent occasions (January 22, 1976, April 5, 1976 and September 20, 1976), I again asked the Coca-Cola Company to grant us the Mr. Pibb franchise (by the letters attached hereto as Exhibits DD, FF, and HH) and on each of those occasions we were again refused the franchise by Coca-Cola. (Exhibits EE, GG and II).

22. Attached hereto as Exhibits JJ and KK are excerpts from the testimony of LCC President Sadler and Dr Pepper Company Vice President Antle confirming that the reason Mr. Pibb is not marketed in the Lake Charles Marketing Area is that LCC has acquired Dr Pepper (and therefore cannot market Dr. Pibb.) Attached hereto as Exhibit LL are documents from the Dr Pepper Company business records showing Dr Pepper Company carefully monitors LCC's marketing of Mr. Pibb, to insure that LCC markets it only in the Lafayette Marketing Area (where it has no Dr Pepper franchise) and not in the Lake Charles Marketing Area (where it has the Dr Pepper franchise.) Thus, since LCC is the Coca-Cola franchisee, no one (including us) can get the Mr. Pibb franchise for the Lake Charles Marketing Area and it is not sold there.

23. When Bayou Bottling was refused the Mr. Pibb franchise (by the Coca-Cola Company) it began to seek some alternative brand in the same flavor category. It found during the course of 1976 that a soft drink named "Dr. Nut" with such a flavor had once been marketed in the New Orleans area. Bayou Bottling therefore on April 30, 1976 purchased the Dr. Nut trademark and formula. A true copy of the bill of sale, corporate resolution and certificate setting forth this sale are attached hereto as Exhibit MM. As Coca-Cola repeated its refusals to award

Bayou Bottling the Mr. Pibb franchise (Exhibits EE, GG and II), Bayou proceeded to develop an improved version of the Dr. Nut flavor. Realizing we would have to manufacture our own extract, we determined we would attempt to franchise the Dr. Nut trademark and sell extract to other bottlers, thereby, among other things, generating income to help finance the introduction of the new branch into our Lake Charles Marketing Area. The principal persons associated with Bayou Bottling (I, Albert Morgan Byrnes, Richard Breaux, Walter Morgan and Burt D. Morgan), formed a corporation named Dr. Nut, Inc., with the intention of promoting Dr. Nut as a franchised soft drink brand and marketing the extract therefrom to various franchisees. A copy of those articles of incorporation is attached hereto as Exhibit NN. In all, we invested approximately $300,000 into that venture. Dr. Nut, Inc. appointed Bayou Bottling as its first franchisee, and Bayou Bottling in fact commenced marketing Dr. Nut in the Lake Charles Marketing Area. Throughout 1977 Dr. Nut also established franchise agreements with numerous bottlers throughout the country and in calendar year 1977 sold a total of $37,-792 worth of extract, $77,734 of cans to wholesalers and $28,604 of cans to bottlers. In 1978 the extract sales increased to $131,769 and the sales of cans to bottlers increased to $68,735 though the sale of cans to wholesalers decreased to $26,725. By 1978 Dr. Nut had established franchise agreements with a total of 27 franchisees located in Alabama, Arizona, Kansas, California, Florida, Louisiana, Mississippi, New Mexico, Tennessee and Texas.

24. Unfortunately, in order to satisfy certain United States patent and trademark regulations, it became necessary for Dr. Nut to withdraw its registration of the "Dr. Nut" trademark and to re-apply for registration, which was done in April 1978. The Dr Pepper Company there-

upon filed a Notice of Opposition to this trademark registration July 10, 1978 (Exhibit OO hereto), even though there was no reasonable ground for that opposition. Dr. Nut, Inc. answered this notice of opposition and filed a complaint for a declaratory judgment against Dr Pepper in the United States District Court for the Western District of Louisiana, Lake Charles Division (Civil Action No. 78-1330). (Exhibits PP and QQ). After the commencement of this antitrust case (in which this affidavit is being filed) Dr Pepper agreed to withdraw its opposition to the trademark application, pay our attorney fees, bear all the court costs and also to consent to a judgment (in the declaratory judgment action referred to above, which had just been started), affirming Dr. Nut, Inc.'s rights and establishing the invalidity of Dr Pepper Company's opposition to the Dr. Nut trademark registration. (Exhibits RR and SS).

25. However, the damage by that time had been done to the efforts to develop the Dr. Nut organization and to promote Dr. Nut sales. While the Dr. Nut trademark was being disputed by the Dr Pepper Company, we felt obligated to advise anyone who was or was interested in becomming a Dr. Nut franchisee of that trademark challenge, and the interest in the franchises and in Dr. Nut generally dissipated. By the end of 1979, sale of Dr. Nut extract had fallen to $75,470, sales of cans to wholesalers had dropped to $15,515 and sale of cans and bottles to bottlers had dropped to $47,352, and the number of active franchisees had dropped to 17. Dr. Nut never was able to recover from this, so that the extract sales continued to drop (to $48,880 in 1980 and $22,522 in 1981). Sales of cans and bottles to wholesalers dropped in 1980 to $3,279, sales to bottlers dropped in 1980 to $6,900, and in 1981 all sales of cans and bottles by Dr. Nut, Inc. was discontinued altogether. The

number of active franchisees dropped in 1980 to 14 and in 1981 to 7. Dr. Nut, Inc. is no longer a viable corporation and its business is in the process of being wound up. During the period referred to above, from 1977 to early this year, Bayou Bottling attempted to market Dr. Nut in the Lake Charles Marketing Area, as the franchisee in that area. We found that it was difficult to gain customer acceptance for a soft drink that did not have the backing of national advertising. Further, we found that marketing Dr. Nut was difficult without the support and recognition gained by having the product sold in other areas, specifically including areas where we lost franchises during the Dr Pepper Company trademark challenge referred to above and particularly with what in effect was a withdrawal from the market in many such areas. In addition, of course, the dissipation of the franchise business Dr. Nut was doing automatically deprived us of the capital not only to further expand the Dr. Nut operation but to finance further promotion of Dr. Nut sales in Lake Charles Marketing Area by Bayou Bottling. These were all substantial contributing factors to the ultimate failure of our attempts to market Dr. Nut through an interstate franchise system and our attempts to market Dr. Nut in the Lake Charles Marketing Area. Attached hereto as Exhibit TT is an excerpt from the August 21, 1981 deposition of Dr Pepper Vice-President Antle, in which he describes as unfair certain opposition by Pepsi-Cola to the Dr Pepper franchising program (in which Pepsi took the position Dr Pepper was a cola), which could only be resolved by litigation. That unfair act by Pepsi, according to Antle, impaired Dr Pepper's franchising efforts, discouraged Dr Pepper's efforts to line up cola bottlers to bottle Dr Pepper and in general undermined the efforts to develop the Dr Pepper franchise system. In my opinion it was at least

equally unfair and in fact more unfair and devastating to the Dr. Nut franchising program for Dr Pepper to commence its frivolous opposition to the Dr. Nut trademark registration.

26. Shortly after we were foreclosed from becomming the Dr Pepper franchisee and wholesaler, by the Dr Pepper Company/LCC/-Wilcox activities described earlier in this affidavit, LCC also embarked upon a program of deeply cutting the wholesale price of its 32 oz. returnable packages of Coca-Cola and Sprite. The 32 oz. Returnable of Bayou Bottling's corresponding brands (Pepsi-Cola and 7-Up) had been by far our most successful product for the preceding two years and the one which we had been most actively promoting. We had been discounting it at 50 cents per case off our standard wholesale price, allowing us to make a profit on this package, but also greatly encouraging sales, so that this was our most successful product and was improving our overall sales and profits. Accordingly, LCC's price cutting on that product hit us where it hurt most. LCC embarked upon this deep price cutting in June, 1975, after it had reached its agreement to buy the Wilcox Dr Pepper business (Exhibit V dated April 25, 1975) and, even though we were challenging Wilcox's renege on his agreement to sell to Bayou Bottling, LCC was apparently by June 1975 confident it would be getting the Dr Pepper franchise (Exhibit Z). This pricing practice by LCC lasted throughout the balance of 1975, throughout the calendar year 1976 and into January 1977. During much of that time, of course, LCC was actually marketing Dr Pepper, particularly throughout the important 1976 summer season and 1976-1977 Christmas/New Year holiday season, so that it could offset its lost profits on the discounted 32 oz. Returnables of Coca-Cola and Sprite with profits from the

popular, established brand of Dr Pepper (which it did not discount). Accompanying this affidavit is the affidavit of Bayou Bottling's Vice-President, Albert Morgan Byrnes, wherein he demonstrates how LCC's price cutting damaged our sales effort.

27. Attached hereto as Exhibit UU are excerpts from the deposition of G. Lester Sadler, President of LCC, in which he acknowledges that that price cutting was discriminatory (in that it was done only in LCC's Lake Charles Marketing Area but not in the Lafayette Marketing Area), that it was specifically aimed at Bayou Bottling's 32 oz. Returnable package, which LCC recognized as one of Bayou's successful sales products, that the reason for the price discrimination was that Bayou Bottling was marketing its product in the Lake Charles Marketing Area but not in Lafayette, that the effect of LCC's price cutting was that LCC took sales away from Bayou Bottling and that this adversely affected the volume of Bayou Bottling's sales.

28. Accompanying this affidavit is the affidavit of Stanley Keyes, a Certified Public Accountant, which demonstrates that LCC's pricing practice referred to immediately above also involved selling below LCC's cost. At the time that LCC's price cutting was occurring (from June 11, 1975 until January 1977) we had done our own calculations of LCC's probable cost, based upon our own knowledge of the industry, and we were certain that they were selling below cost, as confirmed by Mr. Keyes in his affidavit. The discriminatory and below-cost pricing engaged in by LCC in the Lake Charles marketing area did in fact gravely impair our sales as confirmed by LCC's President Sadler, and as further demonstrated in the affidavit of Mr. Byrnes which accompanies this affidavit. Also, of course, when Bayou Bottling ultimately increased its own discount to meet LCC's wholesale price, that cost Bayou Bottling

substantial additional income. Bayou Bottling still has not fully recovered from the adverse effects of that predatory pricing, among other reasons because the lost income has never been recouped, because we had to build sales from a lower base in what had become a completely monopolistic market and because of the loss of promotional and sales momentum and customer acceptance with respect to what had been our most successful product package.

29. As a result of the acts of the defendants described above and of the resulting foreclosure of Bayou Bottling from becomming the Dr Pepper franchisee in the Lake Charles Marketing Area, competition has been seriously injured and substantial and effective competition has been effectively destroyed in that market. LCC's soft drink sales constitute approximately 80% of the total soft drink sales in the market. This includes substantially more than 75% of the total packaged soft drink sales in the Lake Charles Marketing Area. In contrast, Bayou Bottling's soft drink sales constitute no more than 20% of the total soft drink sales in that market. Attached as Exhibit VV are excerpts from market studies conducted for LCC by a professional research and manager consultant firm, Louis Bowles and Grove, Inc., for the Lake Charles Marketing Area in 1977 and 1978. Attached as Exhibit WW is a similar market study by that firm for LCC, covering the Lafayette Marketing Area for 1978 (and containing the comparative 1977 figures). Attached as Exhibit XX are excerpts from the testimony of Bayou Bottling Vice-President Richard Breaux describing LCC's monopoly power.

30. Because of the fact that soft drink wholesaling a high volume business, the increased difference between LCC's sales volume and Bayou Bottling's sales volume means that we cannot begin to compete with LCC. As a result, we simply follow their price. In the market as it now stands, Bayou Bottling has no substantial or effective capacity to provide competitive pressure upon LCC, and

there is no such pressure upon it. Attached hereto as Exhibit YY is the deposition testimony of William Howard, LCC's general sales manager confirming that LCC in fact has the power and exercises the power to set its soft drink prices substantially independently of competition.

31. Further, LCC has an increased and now overwhelming advantage in shelf space in the retail outlets, which as stated above is a principal factor in the sale of soft drinks, particularly because they are essentially an "impulse" item as stated earlier. The deposition testimony from our vice-president and general sales manager for our Lake Charles distribution center, Richard Breaux, attached as Exhibit XX describes the advantages LCC has in respect to shelf space. As stated therein, even though the store manager has the right to tell wholesalers such as LCC and Bayou Bottling how much shelf space each one shall have for its products, LCC, because of its large market share in sales, exercises a great amount of actual power in determining how much shelf space we will get and how much LCC will get. We find that wherever we are able to get a reasonable amount of shelf space, LCC conducts one of its "Weekend Selldown" studies, which purport to demonstrate for the store manager the number of soft drink packages from both LCC and Bayou Bottling on the store shelf on Friday, and then again on Monday. The difference (i.e., the total number of sales) is then compared with the percentage of shelf space, and where, according to their count, LCC's sales exceed its percentage of shelf space, it usually persuades the store manager to increase the percentage of LCC's shelf space. Copies of such weekend selldown studies, produced as exhibits in this case by LCC, are attached hereto as Exhibit ZZ. Generally speaking, the average shelf space allowed for our products in the market is not more than 20% of the total soft drink

shelf space, and such shelf space as we have maintained has been due to the uphill battle waged by our sales organization to persuade store managers to allow us to keep at least that much. In addition to LCC's advantage in bare percentages of shelf space, LCC has virtually unlimited power to arrange its various products within its alloted shelf space in a way to enhance sales of the specific packages and products it is promoting at a particular time and to maximize impact upon the customer through such arrangements, so that its approximately 75-80% of the shelf space so dominates the soft drink area in many stores that it is almost as though our product cannot be seen at all. For example, a very broad front of one kind of Coca-Cola or Dr Pepper package can be presented on the shelf, having a billboard effect upon the customer. That is a kind of point of sale advertising we cannot match at all, with our small share of the shelf space. With the customer's eye and attention thus drawn to LCC's products, and particularly to the product LCC wishes to feature at the time (aimed as it frequently is at some product we have been trying to promote), the customer's eye and attention is drawn to that product and there is a correspondingly reduced chance the customer will see or think about our product at all. Having in mind soft drinks are an impulse item, rather than a so-called "necessity item" which customers specifically seek out to buy, our ability to maintain our market share is obviously injured.

32. Next, LCC has a large advantage over Bayou Bottling in vendors and coolers. Bayou Bottling has 319 vendors supplied out of its Lake Charles plant, and 204 vendors supplied out of its Jennings distribution center, for a total of *523 vendors.* (This figure includes not only vendors Bayou Bottling owns but also vendors it has sold.) It has 63 coolers supplied out of its Lake Charles distribu-

tion center and 104 coolers supplied out of its Jennings plant, for a total of *167 coolers.* By comparison, according to LCC's financial statements, as of December 1978 LCC owned 1,915 vendors supplied out of its Lake Charles plant and 976 vendors supplied out of its Jennings facility, for a total of *2,891 vendors.* In addition, LCC supplies many hundreds more of vendors it has sold but over which it still maintains significant control, (e.g., LCC gives the owner free service if it sells LCC products only.) LCC also has 225 coolers supplied out of Lake Charles and 296 coolers supplied out of Jennings, for a total of *521 coolers.* Attached as Exhibit AAA are copies of the relevant pages of the financial statements of LCC showing the number of vendors and coolers it owned as of year end 1978, 1977, 1976 and 1975. The 1978 figures are, as of now, our latest precise data on the number of LCC's vendors and coolers in our market, though I know from my personal observation they have increased the number of their vendors and coolers since then. But even using their 1978 figures and disregarding the vendors they have sold (and therefore don't actually own, though they still supply them), a comparison with the total vendors Bayou Bottling supplier shows LCC has *85%* of the vendors in our market versus *15%* for Bayou Bottling. In coolers LCC's advantage is 76% versus Bayou Bottling's 24%. LCC's advantage in vendors of over 5 to 1 (at least 85% versus 15%) has an overwhelming market impact. Virtually every place we have a vendor, LCC also has one. For practical purposes, therefore, there is no place where Bayou Bottling's product is available but LCC's product is not. On the other hand, there are a very many places where LCC's product is available and ours is not.

33. LCC effectively prevents us from placing our product in their vendors and coolers. Attached hereto as Exhibit BBB is the testimony of LCC Sales Manager Howard

relating to that subject. To the extent Mr. Howard indicates Bayou Bottling is able to succeed in getting its products into LCC's vendors and coolers, he is wrong. We would like to and try to, but can't. The store owners and vendor-lessees always tell us LCC prohibits them from putting our products in LCC's equipment. Even when the equipment (a vendor) has been sold by LCC, we usually can't get our product in because, the vendor tells us, if they sell LCC products only, they get free maintenance service from LCC, whereas if they stock Bayou Bottling products too, LCC charges for the service call. As reflected in the attached testimony of LCC's Howard, one reason LCC can accomplish this is that they can fill the vendor with both Coca-Cola and Dr Pepper, as well as with the balance of LCC's flavor line. Because it offers customers both the number one (Coca-Cola) and number two (Dr Pepper) drinks, LCC can easily persuade its vendor and cooler users and customers to stock only LCC products in the vendors and coolers. With few exceptions, these people tell us they will not accept Bayou Bottling products for this reason. This means that there is a great number of sales outlets (vendors and coolers) throughout the market where Bayou Bottling cannot sell its products but LCC can and does.

34. The market power of this huge advantage in vendors goes beyond the bare percentages of an 85% to 15% (or 5 to 1) advantage, because of the phenomenon of brand loyalty or customer loyalty, which is maintained by widespread availability. Where someone else's product is available and yours isn't, the customers habitual purchase of your product is interrupted and brand loyalty undermined. Similarly, if your product is consistently available at the customer's place of work, beauty shop or other customary locations for vendors, that brand loyalty is strengthened. In other words, the huge advantage in ven-

dors enjoyed by LCC ultimately results in a higher percentage of *all* sales including not only all sales of packaged goods but also bulk and fountain sales.

35. Similarly, LCC's large advantage in coolers tends to reinforce and enhance its market advantage generally. Particularly in convenience-type stores, a cold soft drink package will outsell a room temperature package. Where the customer anticipates immediate consumption of the soft drink, it is obvious he will tend to seek out the soft drink in a cooler rather than one on the open shelf, so that having over 75% of the coolers tends, again, not only to enhance sales generally but also to further enhance brand or customer loyalty to the owner of those coolers, LCC. LCC, as stated above, prohibits us from putting our product in its coolers. In addition, more of the LCC coolers are the large "visacoolers", whereas approximately 30% of Bayou Bottling's coolers are small "flat top" coolers, so that all in all the cooler advantage enjoyed by LCC is overwhelming.

36. Further, LCC has a substantial economic advantage which it in fact has utilized against us, arising out of the fact that its Coca-Cola franchise extends over two marketing areas: the Lake Charles Marketing Area the Lafayette Marketing Area. This gives LCC the power, for example, to engage in the discriminatory pricing described in paragraphs 26 and 27 above.

37. In addition, LCC has a substantial economic advantage over Bayou Bottling arising from its sheer size. Attached hereto as Exhibits CCC - GGG are excerpts from LCC's financial statements for the years 1974 through 1978. Attached as Exhibits HHH - LLL are the mid-year financial statements for Bayou Bottling Company (we attach those for comparison because they are the ones defendants refer to in their summary judgment briefs.) LCC's "deep pocket" allows it to spend whatever is necessary

to counter any promotional activity Bayou Bottling may attempt. LCC can afford the extra personnel to engage in such activities as the "Weekend Selldown" surveys, which Bayou Bottling cannot afford. LCC can discount when and where it wants in the rare instances where one of our products might make progress in sales.

38. As a result of the concerted actions of Dr Pepper Company, LCC and Wilcox described above, competition in the Lake Charles Marketing Area was not improved, as it would have been by Bayou Bottling's acquisition of the Dr Pepper franchise, and substantial and effective competition was destroyed by LCC instead obtaining that Dr Pepper franchise. Contributing also to the destruction of substantial and effective competition in the Lake Charles Marketing Area was Coca-Cola's refusal to award Bayou Bottling the Mr. Pibb franchise, the predatory pricing and exclusionary practices of LCC described above and its opposition to and effective destruction of the Dr. Nut venture. As a result of the breakdown of competitive conditions in the Lake Charles Marketing Area, arising out of the defendants' acts and practices described above, Bayou Bottling was injured in its business and in its property, particularly in being foreclosed from becoming the Dr Pepper franchisee, in sustaining expenses and loss of past sales, and in loss of capital value of the company (which would include the loss of future sales). These damages are more particularly set forth in the affidavit of Mr. Byrnes which accompanies this affidavit.

/s/ *Fred B. Trahan*
Fred B. Trahan

Subscribed and sworn to before me
this 24th day of September, 1981.
/s/ *Carolyn C. Craig*
Notary Public, State of Louisiana
My Commission at death

[Exhibits Omitted]

AFFIDAVIT OF A. M. BYRNES

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

BAYOU BOTTLING, INC., a
Louisiana corporation,

Plaintiff,

vs.

AFFIDAVIT
Case No. 790-253

DR PEPPER COMPANY, a
Colorado corporation, and
COCA-COLA BOTTLING CO. OF
LAKE CHARLES, INC., a
Louisiana corporation,

Defendants.

STATE OF LOUISIANA)
) SS
PARISH OF CALCASIEU)

Albert Morgan Byrnes, being first duly sworn on oath, avers:

1. I am Albert Morgan ("Judge") Byrnes, Secretary-Treasurer of the plaintiff Bayou Bottling, Inc. ("Bayou Bottling"). I co-manage the Lake Charles offices and distribution center of Bayou Bottling. I reside at 1244 Bayou Wood Drive, Lake Charles, Louisiana. I have been employed by Bayou Bottling since 1973, and since that time I have regularly attended the annual meetings and seminars of the National Soft Drink Association and the meetings of the associations of the franchisees of various brands which Bayou Bottling has bottled over that period, including the Pepsi Cola Bottlers Association and the 7-Up Bottlers Association. I am thoroughly familiar with

the soft drink business. I make this affidavit based upon my personal knowledge. Each opinion expressed by me in this affidavit is given to a reasonable degree of certainty, and is based upon my personal knowledge and my experience and background as a soft drink bottler and wholesaler.

2. It is not true that competition has intensified in the soft drink business in recent years. In the Lake Charles Marketing Area, competition has been substantially destroyed by the merger of Coca-Cola Bottling Co. of Lake Charles, Inc. ("LCC") and Mr. Wilcox's Dr Pepper Company of Lake Charles, Inc. Both in that market area and in the United States generally the private labels are not a substantial competitive force. To the contrary, they play a negligible role, among other reasons because they have no marketwide distribution. Similarly, no significant competition for soft drinks is provided by beverages such as canned tea, bottled water, concentrated, bottled or canned fruit juices or powdered soft drinks—soft drink bottlers pay no attention to the prices of those beverages in pricing their soft drinks.

3. As confirmed by the August 21, 1981 testimony of Dr Pepper Company Vice-President Donald Antle attached hereto as Exhibit A, the number one soft drink in national sales is Coca-Cola, the number two soft drink is Pepsi-Cola and the number three soft drink is Dr Pepper.

4. Dr Pepper at no relevant time has been at and is not now at a competitive disadvantage in the concentrate business. It is a popular flavor. It has a distinctive taste sufficient to place it in a special flavor category, wherein the only other nationally marketed soft drink, Mr. Pibb, has a bearly measurable share of the market. For example, as shown in the Lafayette Marketing Area market study conducted in 1977 and 1978 at the instance of LCC, Mr. Pibb had 1% of the market as contrasted with Dr

Pepper's 15% (exclusive of Diet Dr Pepper). In many areas of the country, Mr. Pibb is not even marketed. For example, in the Lake Charles Marketing Area, Mr. Pibb is not marketed because Dr Pepper Company will not permit LCC to market it, and Coca-Cola will not grant the Mr. Pibb franchise to anyone other than LCC, the Coca-Cola franchisee. (See Trahan affidavit, para. 21-22). Further, there are no substantial economies of scale in respect to the manufacture of concentrate. I personally, along with Mr. Trahan, Mr. Breaux, Mr. Morgan and others, promoted and formed Dr. Nut Corporation with the intent to develop a nationally franchised trademark and concentrate. We were unsuccessful in accomplishing that, due largely to the opposition by Dr Pepper Company to the registration of our trademark and the litigation required in that regard, which dissipated and undermined our efforts to promote Dr Pepper. However, we found that the costs of manufacturing the concentrate and of distributing it to bottlers is relatively minor. If one has a concentrate product of national stature, such as Dr Pepper, and has the national organization established as the Dr Pepper Company does, the fact that the concentrate manufacturer may be a subsidiary of a conglomerate makes little difference, except to the extent that, if it is a part of a conglomerate, other more capital-intensive businesses operated by the conglomerate may drain the concentrate manufacturer of income. The economies of scale involved in the soft drink industry are at the *bottling and wholesale* level, *not the concentrate manufacturing* level.

5. It is not true that there is substantial and effective competition at all levels in the sale of bottled soft drinks. Specifically, there is no substantial and effective competition at the wholesale level of soft drinks in the Lake Charles Marketing Area—that is, the area covered by the

LCC's Dr Pepper franchise, which is substantially co-extensive with Bayou Bottling's franchise areas.

6. There is no term of art in the soft drink industry such as "first tier" or "second tier" competitors. It is true that colas are recognized as a particular flavor category, and that Coca-Cola and Pepsi-Cola are respectively the number one and number two ranking drinks in terms of national sales. Dr Pepper ranks number three. For this reason, Dr Pepper has a particular advantage nationally because it is the largest non-cola. If there were a "first tier" in the soft drink industry, certainly Dr Pepper would be included in that category.

7. It is not true that between 1965 and 1975 there was an expansion of Bayou Bottling's business by "acquisition of competing distributorships" "in concert with Bayou's neighboring Pepsi/7-Up bottler." Bayou Bottling's business remained essentially static from 1965 to 1975. While it is true various flavors were from time to time added to or subtracted from the business production, by far the major portion of the business operation was the production and wholesaling of Pepsi Cola and 7-Up, which remained constant throughout that time, and no brands even approaching the status of a major brand were added. So far as changes in territory are concerned, the only changes were those of a kind to make franchise territories of Bayou Bottling and of neighboring franchisees co-extensive with their respective franchises of other brands, which, as confirmed by Donald Antle of Dr Pepper Company, is standard practice in the industry, commonly engaged in in order to facilitate distribution patterns. (See Trahan affidavit, paragraphs 3 and 20, Exhibits A, Z and AA.)

8. As set forth in the affidavit of Fred B. Trahan which accompanies this affidavit, we at Bayou Bottling became

aware in June 1975 that Coca Cola Bottling Co. of Lake Charles, Inc. ("LCC") had cut its wholesale price for 32 oz. Returnable bottles of Coca Cola and Sprite by a $1 per case discount. I calculated at the time that LCC's cost had to exceed that discounted price. Accompanying this affidavit is the affidavit of Stanley Keyes confirming that, correcting for the accounting and arithmetic errors in the cost computation of Messrs. Sadler and Cargile (in the affidavit they have filed in this case), LCC was in fact selling its 32 oz. Returnable bottles of Coca Cola and Sprite below cost for the period June 11, 1975 to January 3, 1977. The testimony of LCC President Sadler, attached to the Trahan affidavit as Exhibit UU, confirms that this price cutting constituted discriminatory pricing, in that LCC continued to sell its 32 oz. Returnable bottles of Coca Cola and Sprite at its undiscounted price in the Lafayette Marketing Area, where Bayou Bottling did not market any of its products, but discounted its price $1 per case in the Lake Charles Marketing Area, where Bayou Bottling was sellings its products. That Sadler testimony further confirms that it was obvious at the time Bayou Bottling's 32 oz. Returnable package was a successful product, that the success of that product was important to Bayou Bottling's entire business operation, that the price cutting by LCC was specifically aimed at Bayou Bottling's marketing of its products, and that the price cutting did in fact take sales away from Bayou Bottling.

9. I can and do confirm from my own personal knowledge that the price cutting by LCC did in fact injure and damage Bayou Bottling's sales. In early 1975, despite the fact that our warehouse had burned down in late 1974 and that there were generally adverse weather and economic conditions for soft drink sales, we were doing well in sales, particularly with our 32 oz. Returnable. A sales history report from the Pepsi Cola Company attached

hereto as Exhibit B sets forth the case sales of various package sizes of Pepsi Cola by Bayou Bottling Company on a monthly basis for the years 1974 through 1978. Attached hereto as Exhibit C is a chart showing Bayou Bottling's sales of the 32 oz. Returnable package (for both Pepsi Cola and 7-Up) for the years 1975 and 1976.

10. Normally, the months of June through August are months of increased soft drink sales. Those months, plus the month of December wherein the Christmas/New Year holiday sales take place are the best months for soft drink sales.

11. However, in 1975, with the price cutting engaged in by LCC, instead of remaining steady or increasing in June 1975, Bayou Bottling's 32 oz. Returnable sales plummeted from 10,274 cases of Pepsi Cola in June to 8,737 cases in July, and to 7,607 cases in August. In September, October and November the sales continued to decline (to 6,884 in September, 6,359 cases in October and 5,820 cases in November). These sales, as shown on Exhibit A, were substantially below those for the corresponding months of the preceeding year. For the Christmas holidays, we did some additional discounting to meet LCC's price and our sales rebounded somewhat, but as soon as we resumed our earlier price (and were therefore undercut by LCC's below cost selling), our sales dropped right back, as shown on Exhibit B. Therefore, in February we determined we had no alternative but to cut our price to meet the price of LCC, which of course meant we were then selling below cost. Our sales from February began to increase but, of course, all we were doing was holding our market share while losing money in the process. LCC's price cutting on the 32 oz. Returnable bottles of Coca Cola and Sprite continued until the end of the holiday season in January 1977.

12. The damage sustained by Bayou Bottling from LCC's predatory pricing practice described above includes

at least the following: The loss in case sales for July through November 1975, which would be at least the difference between the 1975 sales and those for the comparable months in 1974. That difference totals 21,276 cases, on which Bayou Bottling should have received a sale price of $2.90 per case, which included at least 14 cents per case profit. For December 1975, Bayou Bottling lost 40 cents per case X 11,077, because it had to reduce its price by that much to meet LCC's price. Again in January and February 1976 there was a loss of case sales of at least 7,061 cases, for which we should have had income of $2.90 per case, including at least 14 cents per case profit, and from March through December of 1976 we lost 40 cents per case for the 99,643 cases of Pepsi Cola sold, since we had to reduce our price by that amount to meet LCC's below cost price. In addition to those losses, Bayou Bottling sustained losses in its 7-Up sales, so that, for example, it not only lost case sales involving several hundred cases per month in the period of June through November 1975, but also lost the 40 cents per case amount in December 1975 and March-December 1976, again because Bayou Bottling had to match LCC's price in order to attempt to maintain its market share. In addition, Bayou Bottling never did regain either the market share or the sales and promotional momentum it had had on its 32 oz. Returnable package prior to LCC's price cutting. In effect, the market stabilized (as confirmed by LCC President Sadler) by the beginning of 1977, with LCC in a better position and Bayou Bottling in a poorer position than they were prior to LCC's price cutting. Moreover, since that time, as set forth in the Trahan affidavit, LCC has enjoyed a monopoly position in the Lake Charles Marketing Area, so that Bayou Bottling has not been able to grow as it should have been able to grow. It is reasonable to project that if Bayou Bottling had not been injured by the price cutting of LCC described above,

Bayou Bottling would have sold, on an average, at least 5,000 cases per month of Pepsi Cola 32 oz. Returnables and 1,000 cases per month of 7-Up 32 oz. Returnable more than what Bayou Bottling has been able to sell from and after January 1977. Had Bayou Bottling continued to emphasize promotion of that particular package from and after that time, the sales would even have been more.

13. As set forth in the Trahan affidavit, LCC in fact has the power substantially to control the percentage of shelf space allocated to Bayou Bottling's products versus LCC's products, out of the total shelf space allowed in the various retail stores for soft drinks. It is true, of course, that store managers have the ultimate right and power of decision in this respect, but as shown in the Trahan affidavit and the Breaux testimony attached thereto, store managers as a practical matter usually leave the allocation of the total soft drink space to the wholesalers, which for practical purposes means LCC and Bayou Bottling, and because of LCC's huge volume advantage, usually means only LCC. Frequently, when Bayou Bottling has persuaded the store manager to give it a reasonable amount of shelf space, LCC will conduct one of its "Weekend Selldown" surveys and utilize the survey to persuade the manager that LCC's percentage of sales exceeds its percentage of shelf space, and that it therefore should have an increase in the percentage of shelf space. Of course, LCC only utilizes its survey when it shows LCC sales have exceeded LCC shelf space, so there is a ratchet effect in favor of increasing LCC's percentage of the shelf space. Moreover, apart from the bare percentages of shelf space in which LCC enjoys such an advantage, LCC has the additional advantage of being able to coordinate its marketing

of various products, within its shelf space, in a manner that maximizes the impact of its product presence on the shelf. Thus, having both the number one and number two soft drinks (Coca Cola and Dr Pepper) and being able to coordinate the presentation on the retail stores' shelf of those products, LCC can conduct its promotions in a way which maximizes the impact upon the customer at the point of sale. Correlation between shelf space and sales in the soft drink industry is well known.

14. As also set forth in the Trahan affidavit, the LCC financial statement excerpts attached as Exhibit AAA thereto and the testimony of LCC sales manager William Howard attached as Exhibit BBB thereto, LCC had, as of 1978, 2,891 vendors and 521 coolers in the Lake Charles Marketing Area and also has (and exercises) the power to exclude Bayou Bottling products from those vendors and coolers. As shown in the Howard testimony just cited, LCC supplies its coolers free to various retail stores, and makes the agreement with them that only LCC products will be sold from those coolers (see Howard testimony at p. 241-2). Mr. Howard is wrong in suggesting in his testimony that LCC permits a "reasonable amount of space" to be utilized in the coolers for Bayou Bottling products. The fact is, we cannot put any of our products in those coolers. As admitted by Mr. Howard (testimony, p. 242) LCC's agreement in leasing a vending machine provides that only LCC's products will be vended through that machine, and that by the time LCC's products are put in (Coca Cola, Dr Pepper and the other products) the machine is filled up and Bayou Bottling products thereby excluded. (Id., p. 243).

15. Attached hereto as Exhibit D is the National Soft Drink Association 1978 Sales Survey of the Soft Drink

Industry. As shown on page 6 thereof, over 20% of sales are normally accomplished through vending machines by a soft drink wholesaler. If Bayou Bottling had been permitted access to LCC's vending machines (LCC had 2,891 vending machines in the Lake Charles Marketing Area as of 1978, versus Bayou Bottling's 523 vending machines, per Trahan affidavit, para. 32), it is reasonable to assume Bayou Bottling's sales would have been increased at least 10% annually. This estimate takes into consideration the fact that such access would have multiplied by more than five-fold the vending machine availability of Bayou Bottling products, and would have enhanced brand loyalty for purchases not only at other vending machines but also at retail outlets and other places where the ultimate consumer purchases soft drinks.

16. As further demonstrated by Exhibit D (page 3) national sales of soft drinks increased from $7.8 billion in 1974 to $13.3 billion in 1978, and per capita consumption of soft drinks also rose dramatically in that period. If Bayou Bottling had not been faced with the predatory pricing of LCC, if it had had the economies of scale arising from the addition of the Dr Pepper franchise to its product line and if it had not had to try to compete with a monopolist in its marketing area during that period of time, Bayou Bottling's overall sales would have increased, in my opinion, to a minimum of 3 million cases per year as of the beginning of 1979. This estimate is detailed more fully in the next paragraph below.

17. As a result of the acts and practices of the defendants described in the Trahan affidavit and the other affidavits and documents filed in this action, Bayou Bottling has sustained damages exceeding $15,000,000. I have arrived at this figure as follows:

(a) *Difference in value of Bayou Bottling's business.* If the defendants had not committed the antitrust violations complained of in this action, Bayou Bottling would have a present value of at least $15,000,000. The present actual value of Bayou Bottling does not exceed $5,000,000. The difference between those figures is *$10,000,000*. In arriving at the $15,000,000 figure just referred to, I have estimated what Bayou Bottling's annual sales would have been as of January 1979, had it acquired the Dr Pepper franchise in 1975. I arrived at this figure by considering that Bayou Bottling would have been a more competitive and cost-efficient enterprise with the ability to provide LCC with substantial and effective competition in the Lake Charles Marketing Area. Bayou Bottling would have achieved Dr Pepper and Sugar Free Dr Pepper sales of more than 90 bottles per capita. (In view of the market studies conducted by LCC and attached to the Trahan affidavit as Exhibit VV, this estimate is overly conservative.) I also then added up the sales of 7-Up, Pepsi Cola and Bayou Bottling's flavor brands. I also considered that Bayou Bottling would not have sustained the heavy losses due to LCC's predatory pricing in the period of June 1975 to January 1977, that Bayou Bottling would have sustained additional sales through vendors and coolers and that Bayou Bottling's sales generally would have increased. I checked the sales volume of the Lafayette Pepsi/7-Up franchises which also bottles and wholesales Dr Pepper, and verified that the projected $15,000,000 level of annual sales as of 1979 was a reasonable one. The dollar amount of annual sales is a commonly accepted measure of the fair market value of a busi-

ness engaged in sales. Another commonly accepted measure of the value of a soft drink wholesaling company is a dollar-per-case valuation. As of 1979, the going price for such a company was $5 per case The analysis set forth above confirmed my estimate that Bayou Bottling would have been able to achieve approximately 3 million case sales by the improved and more competitive condition of our company, had it not been foreclosed from obtaining the Dr Pepper franchise. At $5 per case, that would confirm the valuation of $15 million.* However, by virtue of the defendants' antitrust violations, Bayou Bottling is worth no more than $5 million. Its total sales for the last fiscal year (ending September 30, 1978) prior to my computation were $4,238,315, and its case sales were approximately 920,000. The figures would indicate a value of approximately $4.2 to $4.6 million and, in any event, less than $5 million, especially because Bayou Bottling must compete against a monopolist. Therefore, the loss in capital value of Bayou Bottling due to the antitrust violations of the defendants is $15 million (the value Bayou Bottling would have had were it not for those antitrust violations) minus $5 million (the value Bayou Bottling has), for a net amount of *$10 million.*

(b) *Past loss of profits*: Bayou Bottling has also sustained a loss in profits from 1975 to the present, due to each of the predatory and exclusionary practices of LCC described above and to Bayou Bot-

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* The present valuation of a franchise at $5 per case is confirmed by the testimony of Donald Antle on April 18, 1979, attached hereto as Exhibit E, and on August 21, 1981 deposition, Exhibit F hereto.

tling's loss of the Dr Pepper franchise as referred to above, in an amount exceeding $5 million. This dollar figure is based upon the estimates referred to above, and includes the losses described in paragraphs 8 through 16 above.

18. The total damages sustained by Bayou Bottling as of 1979 were at least $15 million. These damages are continuing and plaintiff anticipates at the trial that the total damages asked for will exceed that amount.

/s/ *Albert Morgan Byrnes*
Albert Morgan Byrnes

Subscribed and sworn to before me
this 24th day of September, 1981.
(SEAL)

/s/ *Carolyn C. Craig*
Notary Public, State of Louisiana
My Commission at death

(Exhibits omitted)

AFFIDAVIT OF EDWIN S. MILLS, Ph.D.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

BAYOU BOTTLING, INC., A
Louisiana corporation,

Plaintiff,

vs. AFFIDAVIT

DR PEPPER COMPANY, a Case No. 790-253
Colorado corporation, and
COCA-COLA BOTTLING CO. OF
LAKE CHARLES, INC., a
Louisiana corporation,

Defendants.

CITY OF WASHINGTON)
) SS.
DISTRICT OF COLUMBIA)

Edwin S. Mills, Ph.D., being first duly sworn on oath avers as follows:

1. I am Edwin S. Mills, Ph.D., a Professor of Economics at Princeton University, Princeton, New Jersey. I am also past chairman of the Department of Economics of Princeton University. I am presently on leave from Princeton University to serve as a consultant with The World Bank (The International Bank for Reconstruction and Development) and maintain an office at the headquarters of The World Bank, 1850 I Street, N.W., Washington, D.C. Attached hereto as Exhibit A is a statement of my professional background and activities, which I incorporate by reference herein. I have been retained by the plaintiff Bayou Bottling, Inc. to serve as an expert

witness in the above-entitled action. Each of the opinions I express herein is given to a reasonable degree of certainty, based upon my professional background and experience as an economist, and upon my personal knowledge and study of the pleadings in the above-entitled action (particularly the complaint and the answers and supplemental answers by the plaintiff to the defendants' interrogatories, and the defendants' responses to the plaintiff's request to admit and interrogatories), the market studies conducted at the request of the defendant Coca-Cola Bottling Company of Lake Charles, Inc. by Louis, Bowles & Grove, Inc. in the Lake Charles and Lafayette marketing areas in May 1977 and May 1978, the "Weekend Selldown" studies of LCC marked as exhibits in this case, the deposition testimony of numerous witnesses in this case and various documents marked as exhibits during those depositions.

2. In my opinion, "soft drinks" is a relevant product market in this case and the geographic area covered by the Dr Pepper franchise of the defendant Coca-Cola Bottling Co. of Lake Charles, Inc. (hereinafter referred to as "LCC"), is an area of effective competition and a relevant geographic market in this case (hereinafter referred to as the "Relevant Geographic Market"). These are not the only relevant markets involved in this case, inasmuch as there are markets and submarkets which include or are included in the markets just stated, but those markets just stated are certainly relevant product and geographic markets in this case. The geographic area covered by LCC's Dr Pepper franchise (the Relevant Geographic Market) is substantially coextensive with the franchise area served by the plaintiff Bayou Bottling, Inc. ("Bayou Bottling") and the minor differences between the two franchise areas can, for practical purposes, be ignored.

3. In my opinion, the acquisition by LCC of the Dr Pepper bottling business and franchise formerly owned by Lloyd S. Wilcox seriously impaired competition in the wholesaling of soft drinks within the Relevant Geographic Market. It is further my opinion that had Bayou Bottling acquired the Dr Pepper franchise and business, competition in the wholesaling of soft drinks within the Relevant Geographic Market would have been substantially enhanced. In this respect, there is strong evidence that the wholesaling of soft drinks is a "high volume" business in which the franchisee/wholesaler typically has a relatively large investment in bottling facilities, trucks and other plant and equipment, plus related production and sales personnel. Economies of scale are characteristic of this business, which means that unit cost decreases as the volume of production and sales increases, at least up to a substantial scale.

4. Prior to the sale of the Wilcox Dr Pepper bottling business in 1975, the market shares in the sale of soft drinks in the Relevant Geographic Market were distributed among the wholesalers as follows: LCC had in excess of 45% of the market, Lake Charles Dr Pepper Company, Inc. (Wilcox's Dr Pepper business) had approximately 30% of the market and Bayou Bottling, Inc. had approximately 20% of the market. These market shares are as stated by the officers of Bayou Bottling and are confirmed by the Louis, Bowles & Grove, Inc. studies conducted on behalf of the defendant Coca-Cola Bottling Co. of Lake Charles, Inc., cited above. Negligible shares of the market were filled by so-called "house brands" and other sources of supply. As a practical matter, it is apparent that as of April 1975 Mr. Wilcox's Lake Charles Dr Pepper Company, Inc. was going to be acquired by one of two companies in 1975: Bayou Bottling or LCC.

5. If Bayou Bottling had acquired Lake Charles Dr Pepper Company, Inc. and the related Dr. Pepper franchise, the volume of Bayou Bottling's business would accordingly have increased and would have placed Bayou Bottling on a relatively even footing with LCC. Although it is true LCC would have retained the advantage of having not only that franchise area but also the franchise area (for its Coca-Cola operation) of the Lafayette area, where it maintained another plant, nevertheless, Bayou Bottling's production cost/sales position would have more nearly approached that of LCC in Bayou Bottling's franchise area, which is substantially coextensive with LCC's Lake Charles marketing area.

6. However, because LCC acquired the Lake Charles Dr Pepper Company and related Dr Pepper franchise (and therefore a combined market share of at least 75% of soft drink sales in the relevant market, while Bayou Bottling was left with approximately 20% of the market) a wide disparity was created in the respective market shares of the two principal competitors. This disparity, created by the LCC/Dr Pepper merger just referred to, necessarily tended to involve and did in fact involve a breakdown of the competitive process in the Relevant Geographic Market. This is evident from the fact that one competitor in a high volume business thereby achieved a sales volume advantage approaching 4 to 1 over the next largest (and for practical purposes only other) competitor (here, Bayou Bottling). LCC, therefore, was no longer compelled by the normal competitive motivation to reduce its prices to the lowest point, consistent with its own costs, at which it could operate at a profit. Instead, knowing that the unit costs of its competitor, Bayou Bottling, were and are necessarily higher than its own unit costs (this being a high volume business), LCC has been able to charge a higher price than it would have been able to if it had not ac-

quired the Dr Pepper franchise, and certainly a higher price than it could have charged if Bayou Bottling had acquired the Dr Pepper franchise. Therefore, the practical results of LCC's acquisition of the Dr Pepper franchise and of Bayou Bottling's loss of the opportunity to acquire that franchise are: (a) that there is not substantial and effective competition in the wholesaling of soft drinks in the Relevant Geographic Market, and (b) that LCC can set its prices on a monopolistic basis—that is, it has the power to set its prices substantially independently of effective competition.

7. The economic power achieved by LCC through the disparity in market shares described above, is significantly enhanced by several other economic factors. First is the importance of shelf space in retail outlets. Soft drinks may fairly be regarded as a so-called "impulse item" rather than a "necessity item", so that the degree to which the product is visible on the grocery store shelf or other retail outlet substantially influences the volume of products sold. To the extent LCC can increase its percentage of shelf space (and also areas of so-called secondary display, wherein soft drinks are displayed in the retail outlet on separate racks or other places apart from the regular soft drink shelves in the store), versus the amount of shelf space containing Bayou Bottling products, the monopolistic position of LCC will tend to be self-perpetuating and self-enhancing. LCC conducts what it calls "Weekend Selldown" surveys wherein it counts the amount of soft drinks on the shelf of the retail outlet, determining the number of various product sizes put on the shelf by it and by its competitor, Bayou Bottling. The count is made on Friday and then again on Monday, purporting to show the amount of soft drinks sold by LCC and by Bayou Bottling respectively over that weekend. Where the percentage of sales by LCC is greater than

the amount of shelf space which LCC products have had on the retail outlets shelf, LCC uses the weekend sell-down survey to convince the store manager that it should have a higher percentage of the shelf space which the store is allowing for soft drinks. This, of course, tends correspondingly to reduce Bayou Bottling's percentage of the shelf space. This tends to enhance sales by LCC and reduce sales by Bayou Bottling, which tends to increase the disparity in their respective market shares. In addition, LCC has not only a substantial advantage in the percentage of shelf space (versus that allotted to Bayou Bottling), but also has substantial freedom within its shelf space to arrange its various products (as among its various brands such as Coca-Cola and Dr Pepper, as well as others) and product sizes (32 ounce returnable bottles, other size bottles and cans) in such a way as to maximize its competitive position versus products being featured by Bayou Bottling. Thus its shelf space advantage gives it an even higher power to have impact upon the customer and, ultimately, to sell its soft drink products, than would be indicated by its bare percentage of the soft drink shelf space.

8. The second and third additional factors are interrelated: (a) the phenomenon of customer loyalty, and (b) the substantial advantage LCC enjoys over Bayou Bottling in respect to vending machines, coolers and sales therefrom. Customer loyalty or identification by a customer with a particular soft drink is apparently a well known phenomenon in the soft drink industry. That is, a large portion of soft drink consumers tend regularly to drink one specific brand of soft drink, be it Cola-Cola, Dr Pepper, Pepsi-Cola or some other brand. Maintenance (by the soft drink supplier) of customer loyalty to his brand depends upon the widespread availability of his

brand in the market. That is, it is substantially to the interest of maintaining customer loyalty to a particular product that that product be available in vending machines at gas stations or at work, as well as in grocery stores and other retail outlets and at the various other places consumers normally obtain soft drinks. If, for example, a person who is normally a Pepsi-Cola drinker cannot obtain Pepsi-Cola at the vending machine, at a gas station or at his place of work, he may instead try a Coca-Cola, a Dr Pepper or some other drink. This tends to break the chain of that consumer's regular consumption habit, and undermines his loyalty to Pepsi-Cola. According to Bayou Bottling's sales manager. LCC has an advantage in vending machines over Bayou Bottling in the Relevant Geographic Market of over 4 to 1. Further, LCC has the power to exclude Bayou Bottling's product from being sold in vending machines and coolers supplied by LCC. This power was substantially enhanced by LCC's acquisition of Dr Pepper, inasmuch as the store owner or premises owner where the vending machine or cooler is located can be more readily persuaded to sell only LCC products where LCC furnishes both the number 1 (Coca-Cola) and number 2 (Dr Pepper) selling soft drinks, as well as a variety of other soft drinks (Barq's Rootbeer, various flavors and other soft drinks). If, on the other hand, Bayou Bottling had been able to acquire the Dr Pepper franchise, LCC's ability to dominate vending machine and cooler sales and to exclude Bayou Bottling products from the machines provided and maintained by LCC would have been substantially diminished.

9. The fourth factor is the substantial economic advantage LCC has exercised by virtue of it having a franchise area for its Coca-Cola sales of approximately twice the Bayou Bottling franchise area. That is, in addition to the Relevant Geographic Market defined above,

LCC also has the Coca-Cola franchise area for the so-called Lafayette marketing area, immediately east of the Lake Charles marketing area. This has permitted LCC to sell products in the Relevant Geographic Market at a substantial discount below its normal wholesale price, while continuing to sell at an undiscounted price in the Lafayette marketing area wherein Bayou Bottling does not sell its products. This discriminatory pricing practice was apparently engaged in for a period of 18 months from approximately June 1975 to January 1977. LCC's acquisition of the Dr Pepper franchise substantially enhanced LCC's ability to sustain this discounting practice, both because it provided LCC with the profit margin from an established product (Dr Pepper, which was not being discounted) and because of the higher volume and resulting cost efficiency LCC derived from the addition of the Dr Pepper sales to its volume.

10. A fifth factor adding to the economic power of LCC is its overall economic size, whereby it had substantial economic advantage over Bayou Bottling, including the greater resources to provide vending machines and coolers, various services to customers, and to sustain losses to a degree that Bayou Bottling could not in any price competition between LCC and Bayou Bottling. These overall financial resources further enhance the dominance of the market by LCC.

11. As a result of the breakdown of competitve conditions arising out of Bayou Bottling's loss of the opportunity to acquire the Wilcox Dr Pepper business and franchise, and out of the fact that LCC, instead, acquired that Dr Pepper business and franchise, Bayou Bottling was injured in its business by being deprived of the Dr Pepper franchise, of the higher volume, better profit margins and significantly higher profits it

is likely to have made had it been able to acquire the Dr Pepper franchise. It is apparent that the franchise area which LCC is monopolizing overlaps most of the franchise area in which Bayou Bottling operates, and for practical purposes is coextensive with Bayou Bottling's franchise area, so that the impact upon LCC's activities and monopolistic position described above upon Bayou Bottling are substantial and injurious to Bayou Bottling's business. Bayou Bottling has also been substantially injured in lost sales arising out of the shelf space and discounting practices engaged in by LCC described above. Bayou Bottling has further been injured in the fact that its access to the vending machines and coolers supplied in the market by LCC is effectively precluded. These injuries damage Bayou Bottling's sales and profits not only by the amount of sales lost in the stores and vending machines, but further by the interruption of customer loyalty which ultimately makes itself felt in further loss of market share and lost sales.

/s/ *Edwin S. Mills*
Edwin S. Mills, Ph.D.

Subscribed and sworn to before me
this 9th day of September, 1981.

/s/ *Sharren L. DeJesus*
Notary Public, District of Columbia

My Commission Expires November 30, 1985.

EXHIBIT A

Vita

EDWIN S. MILLS

Home Address	*Office Address*
46 Sturges Way	Department of Economics
Princeton, NJ 08540	Princeton University
(609) 921-6496	Princeton, NJ 08544
	(609) 452-4004 (direct line)
	(609) 452-4005/4000 (messages)

Date and Place of Birth

June 25, 1928
Collingswood, NJ

Marital Status

Married Barbara Dressner Mills, September 1950;
2 Children
Divorced, January 1977
Married Margaret Moore Mills, January 1977

Military Service

U.S. Army: August 1946-April 1948
Commissioned 2nd Lt., June 1947

Education

Collingswood High School — graduated 1946

Brown University — September 1948-June 1951
Graduated, A.B. Degree, *Magna Cum Laude*
Highest honors in Economics
Class of 1873 Prize in Economics
Phi Beta Kappa
Assistantship in Economics Department, Senior year

University of Birmingham, England — September 1951-June 1953

Fulbright Scholarship, 1951-1953

Ph.D. Degree 1956 — Thesis: "The Theory of Inventory Decisions"

Prize for best graduate thesis submitted in 1955

Academic Posts

University College of North Staffordshire, Keele, Staffordshire, England

Assistant Lecturer in Mathematical Economics and Statistics, September 1953-June 1955

Massachusetts Institute of Technology
Instructor, July 1955-June 1957

Johns Hopkins University
Assistant Professor, July 1957-June 1960
Associate Professor, July 1960-1963
Professor, July 1963-June 1970
Chairman, Department of Political Economy, July 1966-June 1969

Princeton University
Professor of Economics and Public Affairs and Gerald L. Phillippe Professor of Urban Studies, July 1970-June 1974
Professor of Economics and Gerald L. Phillipe Professor of Urban Studies, July 1974-June 1976
Professor of Economics, June 1976-
Chairman, Department of Economics, July 1975-June 1977
Director of Graduate Studies, Department of Economics, 1980-1981

Other Professional Activities

Sometime Consultant: U.S. Navy, Bendix Radio Corporation, Rand Corporation, U.S. Council of Economic Advisers, U.S. Bureau of the Budget, Office of Science and Technology, State of Maryland, U.S. Public Health Service,

Lawrence Livermore Laboratory, Mathematica, State of New Jersey, Committee for Economic Development, The Urban Institute, U.S. Department of Housing and Urban Development, The World Bank, Attorneys in several states, Federal Trade Commission, Science Applications, Arthur Young & Co., International Institute for Applied Systems Analysis, Organization for Economic Cooperation and Development, United Nations, Tennessee Valley Authority.

Ford Foundation Faculty Research Fellowship, 1961

Visiting Research Fellow, Cowles Foundation, Yale University, Spring and Summer 1961

Taught courses in mathematical economics and econometrics, Board of Governors, Federal Reserve, Washington, D.C. 1961-62, 1962-63

Teaching staff, Economics Institute, University of Colorado at Boulder, Summer 1960, Summer 1962

Senior Professional Staff, U.S. Council of Economic Advisers, 1964-65

Visiting Economist, Rand Corporation, Summer 1966

Advisory Editor, Scott, Foresman and Company, 1968-1975

Member, President's Science Advisory Committee, Panel on the Environment, 1968-1971

Member, Interuniversity Committee on Urban Economics, 1968-1976

Chairman, Governor's Council of Economic Advisers, State of Maryland, 1969-1970

Chairman, Study Commission on the State Tax Structure, State of Maryland, 1969-1971

Board of Editors, *American Economic Review, Quarterly Journal of Economics, Journal of Regional Science,* 1971-72

Project Director, Sub-committee on Quality of the Environment, Committee for Economic Development, 1970-74

Member, Committee on Motor Vehicle Emissions, National Academy of Sciences, 1972-74

Member, Policy and Advisory Board, Economics Institute, 1972- Chairman, 1973-

Editor, *Journal of Urban Economics,* 1973-

Member, Systems and Program Analysis Panel, General Accounting Office, 1973-78

Chairman, Universities-National Bureau Committee for Economic Research, 1974-79

Chairman, Committee on the Assessment of Demand for Outdoor Recreational Resources, National Academy of Sciences, 1974-75

Elected member, Council of the Regional Science Association, 1974-77

Member, Energy Forecasting Advisory Committee, Federal Energy Administration, 1974-76

Member, Panel of Experts, Experimental Housing Allowance Program, Department of Housing and Urban Development, 1975-

Member, Modeling Resources Group, Committee on Nuclear and Alternative Energy Systems, National Academy of Sciences and National Academy of Engineering, 1976

Editor, *Studies in Urban Economics,* Academic Press, 1977-

Project Director, Subcommittee on Technology Policy, Committee for Economic Development, 1978-79

Member, Committee on Recovering Energy and Materials from Municipal Solid Wastes, National Academy of Sciences, 1978-1980

Visiting Professor, Ben Gurion University of the Negev, Beersheba, Israel, January 1979, June 1979

Visitor, International Institute of Applied Systems Analysis, January 1979, January 1981

Member, Governor's Special Advisory Commission on Hazardous Wastes, N.J., 1979

Member, Research Advisory Board, Committee for Economic Development, 1980- Chairman, 1981-

Member, Advisory Committee on Economics, Sloan Foundation, 1979-1981.

Member, Technical Advisory Committee, General Telephone & Electronics Co., 1980-

Member, Motor Vehicle Nitrogen Oxide Standard Committee, National Academy of Sciences, 1980-81.

Visiting scholar, World Bank, 1981-82.

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No. 83-2088

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BAYOU BOTTLING, INC.,

Petitioner,

—v.—

DR PEPPER COMPANY and COCA-COLA BOTTLING COMPANY OF LAKE CHARLES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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July 17, 1984

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QUESTION PRESENTED*

On the facts of this case, did the district court and court of appeals err in concluding (i) that the failure of Petitioner (a bottler of Pepsi-Cola and 7-Up) to acquire its competitor (a bottler of Dr Pepper) was not an *antitrust* injury entitling Petitioner to recover treble damages, and (ii) that Petitioner was not entitled to equitable relief?

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* Pursuant to Supreme Court Rule 28.1, Respondent Dr Pepper Company states that it is a wholly-owned indirect subsidiary of DP Holdings, Inc.; Respondent Coca-Cola Bottling Co. of Lake Charles, Inc. states that it is a wholly-owned subsidiary of Baton Rouge Coca-Cola Bottling Company, Ltd.

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TABLE OF ABBREVIATIONS

Abbreviation	*Reference*
Bayou	Petitioner Bayou Bottling, Inc.
Dr Pepper	Respondent Dr Pepper Company
LCC	Respondent Coca-Cola Bottling Co. of Lake Charles, Inc.
LCDP	Lake Charles Dr Pepper Company, Inc.
Pet.	Petition for certiorari
Pet. App.	Appendix to Petition for certiorari
[Deponent] dep., at —	Depositions
[Affiant] aff. ¶ —	Affidavits
R —	Record on appeal

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

This case is yet another in the list of "private state [law] suits masquerading as antitrust actions." *Copperweld Corp. v. Independence Tube Corp.*, 52 U.S.L.W. 4821, 4828 (U.S. June 19, 1984) (No. 82-1260; slip op. at 23). Lloyd Wilcox, the owner of the Lake Charles Dr Pepper Company, decided to sell the company and retire. Two firms expressed an interest in buying, Respondent LCC (the local bottler of Coca-Cola) and Petitioner Bayou (the local bottler of Pepsi-Cola and 7-Up). Wilcox decided to sell to LCC, and three years after Bayou's state court action against Wilcox was dismissed, this "antitrust" suit was filed. Bayou claimed that it was entitled to recover treble damages in the form of the profits that it would have made if it, rather than LCC, had made the acquisition.

The district court and a unanimous court of appeals both concluded that Bayou's claimed injury was not an "antitrust injury" under this Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and entered summary judgment for Respondents. That determination was correct, and it presents no conflict with any decision of this Court or of any other court of appeals. Further appellate review is therefore unwarranted and certiorari should be denied.

STATEMENT

1. *The parties and the industry.* Petitioner Bayou is a wholesaler and distributor of soft drinks in southwest Louisiana; it sells Pepsi-Cola, 7-Up, and a large number of other soft drink brands. Respondent Dr Pepper manufactures concentrate for its trademarked Dr Pepper soft drink products; the concentrate is sold, pursuant to license agreements, to local bottlers. Respondent LCC bottles and distributes soft drinks in southwest Louisiana; it is a licensee of The Coca-Cola Company and, since 1976, Dr Pepper.

There are more than 50 soft drink concentrate manufacturers in the United States, including such firms as Coca-Cola, PepsiCo, Seven-Up, Royal Crown, Crush, and Dr Pepper. Typically, these firms sell their concentrates to local bottlers under exclusive territorial license agreements; the bottlers manufacture finished soft drink products and distribute the products in their licensed areas. Successful marketing depends upon widespread availability and frequent service, in-store rotation, and merchandising. Exclusive territorial licenses—which Congress approved in 1980 when it passed the Soft Drink Interbrand Competition Act, 15 U.S.C. §§ 3501-03—are necessary to induce the bottlers to perform these costly functions.

The brands of the smaller concentrate manufacturers, such as Dr Pepper, rarely generate sufficient volume in a given

territory to support an independent bottling operation of their own. Consequently, Dr Pepper, like many other concentrate manufacturers, often enlists local bottlers of other brands, such as Coca-Cola, Pepsi-Cola, 7-Up, and Royal Crown, to take on (or "piggyback") Dr Pepper and thus use their existing production and distribution systems to promote Dr Pepper in addition to their other brands. Through "piggybacking," Dr Pepper was able to increase retail consumption of its products from 96.3 million cases in 1968 to 299 million cases in 1978. (Antle aff. ¶¶ 4, 8).

2. *The LCDP acquisition.* In early 1975, Lloyd Wilcox, the owner of the local Dr Pepper bottling company (LCDP), decided to sell the company and retire. Two parties expressed an interest in buying, Bayou and LCC. Dr Pepper, believing LCC to be the more effective bottler, urged Wilcox to sell to LCC. After negotiating with both parties, Wilcox entered into a written agreement on April 25, 1975, for the sale of LCDP to LCC for $1,000,000. Bayou contends, however, that on April 23, 1975 (two days earlier), Wilcox orally agreed to sell to Bayou for $1,000,000. For purposes of their summary judgment motions, Dr Pepper and LCC have assumed this allegation (which they deny) to be true.[1]

In May 1975, Bayou sued Wilcox in Louisiana state court for specific performance of the alleged oral contract for the sale of LCDP. The state court dismissed the action, finding it barred by the statute of frauds, and Bayou did not appeal. Consummation of LCC's acquisition of LCDP had been held in abeyance pending the outcome of the state court suit, but in June 1976 LCDP was merged into LCC.

Bayou contends that, prior to LCC's acquisition of LCDP, LCC had a market share in excess of 45 percent, LCDP had a

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1 At the same time that Bayou and LCC were bidding for LCDP, they were also seeking to purchase the Dr Pepper bottler in the adjacent locality, Lafayette. The Lafayette bottler was in fact sold to one of Bayou's affiliates, and Dr Pepper approved the sale.

30 percent share, Bayou had 20 percent, and all remaining companies had less than 5 percent. Bayou also claims that, following the acquisition, LCC obtained a market share of more than 75 percent. Although Bayou's proposed relevant market and its market share calculations are completely divorced from reality, for purposes of their summary judgment motions, Dr Pepper and LCC have again assumed these allegations to be true.[2]

In the years after the acquisition, Bayou has fared well; between 1974 and 1979, its case sales doubled, its revenues increased from $2,210,000 to $4,200,000, and its profits increased steadily from a $214,000 loss to a profit of $263,000. (R 1119). Bayou's owners, who purchased the company in December 1976 for only $300,000 (Pet. App. 13), have realized a very substantial return.

3. *Proceedings below.* Bayou filed its complaint, seeking $45,000,000 in treble damages and a decree of divestiture, on February 23, 1979. After exhaustive discovery, Dr Pepper and LCC moved for summary judgment. The district court granted the motions (Pet. App. 11-42 (543 F. Supp. 1255)), and the Court of Appeals for the Fifth Circuit unanimously affirmed (Pet. App. 1-10 (725 F.2d 300)).

The court of appeals first addressed LCC's acquisition of LCDP and the injury that Bayou contended it suffered in that regard. Since Bayou's claimed injury was simply that Bayou had failed to purchase LCDP itself, the court concluded that Bayou had not met the "antitrust injury" requirements es-

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2 The lack of support for Bayou's allegations should nevertheless be mentioned. Apart from a completely unsupported assertion in an affidavit (Pet. App. 89), there was no evidence in the record supporting Bayou's allegation that LCC's Dr Pepper territory was a relevant geographic market. Much less was there any evidence to support Bayou's market share calculations; these were based entirely on the assertion of its president, Mr. Trahan (Pet. App. 51), who had previously testified that Bayou was "number two" in the market (with more sales than LCDP), and that it aimed to become "number one." (Trahan dep., at 306).

tablished by *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Bayou's failure to acquire its competitor was not an injury that "flows from that which makes defendants' acts unlawful," *id.* at 489, and it was not an injury "of the type the antitrust laws were designed to prevent," *id.* (Pet. App. 5-7 (725 F.2d at 303-04)).

Having determined that the LCDP acquisition provided Bayou with no basis for a treble damage recovery, the court of appeals next analyzed Bayou's allegations of "exclusionary conduct"—LCC's conduct with regard to vending machines and shelf space and its allegedly "predatory" pricing. The court held that LCC was lawfully entitled to provide free maintenance for vending machines stocked only with LCC products and to prevent store owners from placing Bayou's soft drinks in vending machines owned by LCC; these were not "exclusionary" but, rather, "competitive acts." (Pet. App. 7-8 (725 F.2d at 304)). With regard to shelf space, the court noted that "Bayou [had] acknowledge[d] that store owners apportion their shelf space on the basis of sales and that LCC has only that portion consistent with its total share of the soft drink market" (Pet. App. 8 (725 F.2d at 304)); LCC was not required, as the district court put it, to "somehow compel store managers to give preference to its competitor's wares." (Pet. App. 34 (543 F. Supp. at 1267)). Finally, the court of appeals agreed with the district court that there was nothing "predatory" about LCC's discount prices for 32-ounce returnable bottles of Coca-Cola and Sprite; LCC's prices on its full line of soft drink products were far above its average total costs. (Pet. App. 8-10 (725 F.2d at 304-05)).[3]

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3 The court of appeals saw no need to address two other Bayou allegations—one regarding its failure to obtain a license for Mr. PiBB, the other regarding the commercial failure of its product Dr. Nut. The district court had properly rejected these allegations: "With respect to the inability to obtain a franchise for Mr. PiBB, suffice to say here that all parties admit that the decision to grant franchises for this product only to Coca-Cola bottlers is a unilateral decision of the national Coca-Cola Company, which is not a party to this suit. Further, although it is apparent to the court that the failure of the

Thus, since Bayou had suffered no antitrust injury as a result of the LCDP acquisition and since the other conduct complained of was entirely lawful, the court of appeals affirmed the grant of summary judgment to Dr Pepper and LCC.

4. *The petition for certiorari.* Bayou's Petition raises four questions. The first three challenge the determination below that Bayou suffered no antitrust injury as a result of the LCDP acquisition. (Pet. i, 8-17). The fourth question asks whether Bayou was entitled to a decree of divestiture. (Pet. i, 17-21). The Petition does not seek review of the lower courts' rulings that Respondents did not engage in any predatory or exclusionary practices.

REASONS FOR DENYING THE WRIT

This is plainly not a case in which there are "special and important reasons" for granting certiorari. S. Ct. R. 17(1). The conclusion of the courts below that Bayou incurred no compensable "antitrust injury" by reason of its failure to acquire LCDP was but a routine application of the principles established by this Court unanimously in the *Brunswick* case. That determination is entirely consistent with the applicable decisions of this Court and the decisions of the other courts of appeals. Nor does the determination by the courts below that Bayou is not entitled to a decree requiring divestiture of LCDP present any issue worthy of Supreme Court review. Bayou has alleged no threatened injury that would entitle it to any equitable relief, including divestiture, and in any event the law is clear that divestiture is not a remedy available to a private plaintiff.

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attempt to promote Dr. Nut was in no way attributable to any anticompetitive conduct by the parties to this lawsuit, the court is precluded from considering this question by the principle of res judicata, since Bayou and Dr Pepper have already resolved this matter by means of settlement." (Pet. App. 32 (543 F.Supp. at 1266)).

I. The determination that Bayou suffered no antitrust injury as a result of the LCDP acquisition was correct and conflicts with no decision of this Court or of the other courts of appeals

A. A plaintiff in a private antitrust action cannot recover treble damages simply by proving that the defendants violated the antitrust laws and that the plaintiff suffered injury. The plaintiff must also show that his injury is "attributable to something the antitrust laws were designed to prevent." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981). Accordingly, even if Bayou were able to establish that the LCDP acquisition violated the antitrust laws, and that the acquisition actually injured Bayou, those facts alone would not entitle Bayou to damages. As this Court held unanimously in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977):

> We . . . hold that for plaintiffs to recover treble damages on account of [an illegal acquisition], they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

Id. at 489 (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969)); *accord, Associated General Contractors v. California State Council of Carpenters*, 103 S. Ct. 897, 910 (1983); *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 482 (1982).

Analysis of the injuries alleged by Bayou in this case and their relation to any anticompetitive effects that might have resulted from the LCDP acquisition demonstrates, as the courts below determined, that Bayou's claim fails both aspects

of the *Brunswick* test: (1) Bayou has not incurred injuries that "flow from that which [might have made the acquisition] unlawful" and (2) it has not incurred injuries "of the type the antitrust laws were intended to prevent."

1. If LCC's acquisition of LCDP violated sections 1 or 2 of the Sherman Act or section 7 of the Clayton Act—a proposition Respondents strongly deny but have accepted for purposes of their summary judgment motions—it was because the acquisition had one or more of the following effects: (a) eliminating competition between LCC and LCDP, (b) increasing concentration in the "relevant market" (i.e., reducing the number of competitors), or (c) giving LCC market power (i.e., the power to restrict output and increase prices). *E.g.*, *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974); *United States v. Union Pacific R.R.*, 226 U.S. 61, 88 (1912); Easterbrook & Fischel, *Antitrust Suits by Targets of Tender Offers,* 80 Mich. L. Rev. 1155, 1160 (1982). Although these effects might have impaired competition in the market, they could not have caused injury to Bayou and, indeed, they are not the basis for any of Bayou's claimed damages. Rather, *all of the damages Bayou contends it suffered as a result of the acquisition are due to the fact that, because LCDP was acquired by LCC, Bayou was unable to acquire that company itself.*[4]

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4 Bayou's damages theory is set forth in its response to Dr Pepper Interrogatory No. 73 (R 319): "If the defendants' antitrust violations had not occurred, the present value of the plaintiff's business would be $10,000,000 more than what it actually is. This difference is based upon the fact that if the antitrust violations had not occurred, the plaintiff would now have the Dr Pepper franchise and would have strengthened the plaintiff's entire bottling operation, produced operating efficiencies and generated substantially increased sales, and further would not have to compete with a monopolist (the defendant Coca-Cola Bottling Co. of Lake Charles, Inc.) now, nor at any time from mid-1975 to the present. In addition to the differential in the present value of plaintiff's business, the loss in profits from mid-1975 to the commencement of the lawsuit arising from those factors totals $5,000,000. The total of those two figures produces the sum of $15,000,000." (See also Pet. App. 84-87; Byrnes dep., vol. 1 at 176-91).

Bayou argues that the fact that LCC, rather than Bayou, acquired LCDP injured Bayou in five ways: (a) Bayou "lost" sales of Dr Pepper products it would have made and economies of scale it would have obtained if it had acquired LCDP; (b) LCC became more efficient as a result of the acquisition, placing Bayou at a disadvantage; (c) LCC obtained the ability to charge higher prices; (d) LCC obtained an advantage in shelf space and vending machines; and (e) LCC obtained the ability to engage in predatory conduct. None of these allegations, even if established, would provide Bayou with a permissible basis for recovering treble damages.

a. First, with respect to Bayou's allegation of lost Dr Pepper sales and economies of scale (Pet. 5), Bayou's damages all result from the simple fact that someone other than itself acquired LCDP. As the courts below correctly perceived (Pet. App. 7 (725 F.2d at 304); Pet. App. 31 (543 F. Supp. at 1265-66)), those damages do not reflect the anticompetitive effect, if any, of the acquisition *by LCC*. Bayou would have suffered the very same "loss" of sales and scale economies if LCDP had been acquired by any independent third party or if Wilcox had retained it himself. Therefore, as *Brunswick* demonstrates, that "loss" is unrelated to any reason why LCC's acquisition of LCDP might be held unlawful.

In *Brunswick*, a bowling equipment manufacturer (Brunswick) acquired some 222 bowling centers from various companies that had defaulted on payments for equipment purchased from Brunswick. The plaintiffs, operators of competing bowling centers, proved that these acquisitions violated section 7 of the Clayton Act on the theory that, "because of its size [Brunswick] had the capacity to lessen competition in the markets it had entered by driving smaller competitors out of business." 429 U.S. at 481. The plaintiffs also proved that the illegal acquisitions caused them injury, based on the fact that if Brunswick had "allowed the defaulting centers to close, [plaintiffs'] profits would have increased." *Id.* Although the Court accepted the plaintiffs' theory of antitrust violation, it held that the damages sought could not be recovered because those

damages were "of no concern to the antitrust laws." *Id.* at 487. The Court said:

> If the acquisitions here were unlawful, it is because they brought a "deep pocket" parent into a market of "pygmies." Yet [plaintiffs'] injury—the loss in income that would have accrued had the acquired centers gone bankrupt—bears no relationship to the size of either the acquiring company or its competitors. [Plaintiffs] would have suffered the identical "loss"—but no compensable injury—had the acquired centers instead obtained refinancing or been purchased by "shallow pocket" parents . . . .

Id. As the courts below recognized, the "lost" Dr Pepper sales and scale economies Bayou complains of here suffer from the same flaw. In this case, as in ***Brunswick***, Bayou "would have suffered the identical 'loss'—but no compensable injury" if LCDP had been acquired by someone other than LCC or if it had not been sold at all.

Bayou finds fault with this analysis, contending that "any damage . . ., whether a competitive type injury or not, *could* result from a hypothetical cause not involving antitrust violation." (Pet. 15). Bayou misconstrues the lower courts' opinions. The courts below did not reject Bayou's claimed injuries because those injuries "could" have resulted from some other hypothetical cause. Rather, the district court and court of appeals both determined that Bayou's claimed injury bore no relation to anything that might have made LCC's acquisition anticompetitive. In making that determination, it was entirely appropriate for those courts to analyze whether Bayou would have suffered the identical injuries from the same injury-causing act even if no anticompetitive effects had occurred.[5] That comparative analysis served to highlight the

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5 In applying ***Brunswick***, the courts of appeals have consistently engaged in this sort of comparative analysis. *See, e.g.*, McDonald v. Johnson & Johnson, 722 F.2d 1370, 1374-78 (8th Cir. 1983), *cert. pending*, No. 83-1659 (filed Apr. 10, 1984); Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1235 (6th Cir.), *cert. denied*, 454 U.S.

more basic point—that Bayou's "loss" of the sales and scale economies it might have had if it had acquired the Dr Pepper franchise has nothing to do with any of the alleged anticompetitive effects of LCC's acquisition, i.e., the elimination of competition between LCC and LCDP, the reduction in the number of competitors in the "market," or the alleged creation of market power. *See* Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127, 1133 (1976).

Similarly, Bayou is not aided by its allegation that it was injured because LCC's acquisition "blocked" an "improvement" in competition that would have occurred if Bayou had made the acquisition. (Pet. 5-6, 10). Even if Bayou's allegation were true—which it is not (see p. 15 below)—the "blocking" of Bayou's proposed acquisition is not "that which [might have made LCC's acquisition] unlawful" under *Brunswick*. 429 U.S. at 489. There are countless situations in which competition might be better off if, for example, company *A* were acquired by company *B* rather than company *C*. That does not make *C*'s acquisition unlawful. *C*'s acquisition would be unlawful only if it tended to lessen competition substantially, i.e., if it eliminated substantial competition between the merging firms, increased concentration unduly, or created market power. In this case, Bayou's claimed injury cannot be traced to any such possible effects, and Bayou's "blocking" argument is therefore irrelevant. *See Pennzoil Co. v. Texaco, Inc.*, 1984-1 Trade Cas. ¶ 65,848 (N.D. Okl.), *aff'd*, 1984-1 Trade Cas. ¶ 65,896 (10th Cir. 1984).

b. Second, Bayou contends that the acquisition decreased LCC's unit costs, increasing the "disparity" between LCC and Bayou and making it more difficult for Bayou to compete. (Pet. 6). This claim is nothing more than a complaint that the acquisition lowered LCC's costs and improved its efficiency. Yet a principal purpose of the antitrust laws is to *encourage*

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893 (1981); A.D.M. Corp. v. Sigma Instruments, Inc., 628 F.2d 753, 754 (1st Cir. 1980); Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1169 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979).

firms to reduce costs and improve efficiency, and thereby lower prices to consumers. *See, e.g.*, *NCAA v. Board of Regents of the University of Oklahoma*, 52 U.S.L.W. 4928, 4932-34 (U.S. June 27, 1984) (No. 83-271; slip op. at 14-20); *Copperweld Corp. v. Independence Tube Corp.*, 52 U.S.L.W. 4821, 4827 (U.S. June 19, 1984) (No. 82-1260; slip op. at 18); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52-59 (1977); *E.I. duPont de Nemours & Co.*, 96 F.T.C. 653, 750-51 (1980); U.S. Department of Justice, *Merger Guidelines—1984* § 3.5 (June 14, 1984). Since an improvement in efficiency is procompetitive, and since the antitrust laws do not permit a plaintiff "to label increased competition as a harm," *Blue Shield of Virginia v. McCready*, 457 U.S. at 483 n.19, the fact that the acquisition made LCC more efficient cannot be a basis for treble damage liability. *See, e.g.*, 2 P. Areeda & D. Turner, *Antitrust Law* ¶¶ 345, 346a, at 239-40, 247 (1978); *see also California Computer Products, Inc. v. IBM Corp.*, 613 F.2d 727, 742 (9th Cir. 1979); Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467 (1980).

c. Third, Bayou claims that the LCDP acquisition had the effect of enabling LCC to charge higher prices. (Pet. 6). But Bayou nowhere explains how it could possibly have been injured in this regard. If Bayou's assertion that the acquisition resulted in increased prices were correct, Bayou would have *benefited* from the acquisition; the higher the prices charged by LCC, the greater Bayou's sales and profitability would necessarily be. Easterbrook & Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 Mich. L. Rev. at 1160; *see also Associated General Contractors v. California State Council of Carpenters*, 103 S. Ct. at 909-10; *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 211 (3d Cir. 1980).

d. Fourth, Bayou contends that the acquisition has given LCC an advantage in shelf space and vending machines. (Pet. 12-13). Since it is undisputed that Bayou's percentage of the local shelf space and its share of the vending machine placements were both unaffected by the acquisition (Pet. App. 18-19, 32-34 (543 F. Supp. at 1260, 1266-67)), it is evident that

Bayou has suffered no injury whatsoever in this regard. Bayou's argument seems to be that LCC, having acquired LCDP, must now donate space to Bayou in its vending machines and convince store owners to give Bayou's products preferential treatment on the shelf. As this Court has held repeatedly, however, the "antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.' " *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 488 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)); *accord*, *Copperweld Corp. v. Independence Tube Corp.*, 52 U.S.L.W. at 4825 n.14 (slip op. at 13 n.14). Bayou's shelf space and vending machine "disadvantage" thus cannot be a basis for treble damages. *See also* 2 Areeda & Turner ¶ 346a, at 247.

e. Finally, Bayou alleges that the acquisition enabled Respondents to engage in what Bayou describes as predatory conduct, i.e., predatory pricing of Coca-Cola and Sprite in 32-ounce returnable bottles, depriving Bayou of Mr. PiBB and Dr. Nut, and exclusionary practices with respect to shelf space and vending machines. (Pet. 6-7).

If Bayou could have proved that it was the victim of predatory conduct, the resulting damages would have been recoverable. But the mere fact that the acquisition may have given LCC the power to engage in predatory practices gives Bayou no right of recovery, for it is the actual exercise of market power to inflict injury upon a plaintiff—not the mere possession or acquisition of the power—that entitles a private plaintiff to damages. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 487-89; *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1374-79 (8th Cir. 1983), *cert. pending*, No. 83-1659 (filed Apr. 10, 1984). As Professors Areeda and Turner explain, if a merger is condemned because it tends to give the acquiring firm sufficient market power to engage in predatory conduct, that does not mean "that any predatory activity has occurred. Of course, if any actual predation does occur, the resulting damages would be compensable . . . ." 2 Areeda & Turner ¶ 345, at 238-39. In other words, Bayou cannot recover simply by proving that the

LCDP acquisition was illegal because it gave LCC the power to engage in predatory conduct; for if LCC really had engaged in any predatory practices, any damage suffered by Bayou would not have been caused *by the acquisition*, but by the predatory practices themselves. If Bayou had wanted to recover damages caused by Respondents' alleged predation, Bayou would have had to have shown that predation in fact occurred; proof that the acquisition was illegal, without proof of actual predation, does not entitle Bayou to damages.[6]

Moreover, the damages Bayou is seeking to recover as a result of the acquisition are unrelated to any possible predation. Bayou's damage theory is that it is entitled to the profits it would have earned if it, rather than LCC, had acquired LCDP. (See pp. 8-11 above). Those may be damages caused by the acquisition, but they have nothing to do with any predation. Therefore, as *Brunswick* makes plain, those damages cannot be recovered even if it were assumed that the acquisition was illegal.

The plaintiffs in *Brunswick* claimed that they were injured by a pattern of "predatory" conduct, supported by the defendant's "deep pocket," including its installation of new equipment unavailable to the plaintiffs, its price cutting, and its operation of bowling centers at a loss for over five years after the acquisitions at issue were made. Brief for Respondents at 8-13, 27-30, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (No. 75-904); *see also* 429 U.S. at 490. The plaintiffs' damage theory, however, was not based on the alleged predation; it was based on the fact that the acquisition prevented the acquired bowling alleys from going out of business. Since those damages were not caused by the predatory conduct, and thus were unrelated to the reasons for

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6 Bayou argued in the lower courts that, in fact, it had been injured by predatory conduct, but the courts below properly ruled that Respondents' conduct was in no way predatory (Pet. App. 7-10 (725 F.2d at 304-05); Pet. App. 31-37 (543 F. Supp. at 1266-68)), and Bayou has not challenged those rulings here. (Pet. i, 8-21).

holding the acquisition unlawful, the Court held that they could not be recovered. 429 U.S. at 487-90.

2. The courts below were also correct in holding that Bayou's claimed injuries are not "of the type the antitrust laws were designed to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 489. The antitrust laws were just not designed to prevent "damages" caused by a firm's failure to acquire its competitor—especially under the circumstances here. Bayou's damages claim could have been dismissed for that reason alone.

In this case, a local Dr Pepper bottling company was sold to the local bottler of Coca-Cola, rather than to Bayou, the local bottler of Pepsi-Cola, 7-Up, and a host of other popular soft drink brands. (Pet. App. 13 n.1). Although Bayou claims that the acquisition was unlawful, if Bayou's analysis of the relevant market is correct, the acquisition would have been just as illegal if Bayou had been the acquiror. If the market shares alleged by Bayou were accepted, the acquisition by Bayou of LCDP would have resulted in the merger of a 20 percent firm with a 30 percent firm, and reduced the number of major competitors in the market from three to two. Such a merger would clearly be unlawful. *See, e.g.*, *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966). Thus, Bayou is claiming injury because it failed to make an acquisition which, by the force of Bayou's own analysis, would have violated the antitrust laws. No such injury is "of the type the antitrust laws were designed to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 489; *see Kestenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564, 569-70 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979).

B. The decision below is entirely consistent with (1) the applicable decisions of this Court and (2) the decisions of the other courts of appeals.

1. This Court has addressed questions relating to antitrust damages in four recent cases—*Brunswick*, *J. Truett Payne*,

McCready, and *Associated General Contractors*. The court of appeals relied on all four of those decisions in upholding the judgment in Respondents' favor. (Pet. App. 4-7 (725 F.2d at 303-04)). Bayou does not even purport to claim that the decision below conflicts with *Brunswick*, *J. Truett Payne*, or *Associated General Contractors*, but it seems to imply a conflict with *McCready*. (Pet. 16-17). *McCready* is in no way contrary to the decision below. A principal anticompetitive effect of the conspiracy there between Blue Shield and the psychiatrists was that consumers, such as the plaintiff, were prevented from making a free choice between obtaining the services of psychologists and psychiatrists. The plaintiff's injury—nonreimbursement for payments to her psychologist—flowed directly from that anticompetitive effect, as the Court found. 457 U.S. at 483-84. Bayou's claimed injuries here, in contrast, bear no relation to the alleged anticompetitive effects of the acquisition, as the court of appeals correctly ruled. (Pet. App. 6-7 (725 F.2d at 303-04)).

2. Bayou's statement at the outset of its argument that the decision below "conflicts with decisions of other federal courts of appeal" (Pet. 8) is difficult to understand, for the remainder of the Petition fails to identify a single decision even arguably in conflict with the decision below. The plain fact of the matter is that the court of appeals' routine application of *Brunswick* is completely consistent with every other circuit court decision on the point. (See p. 10 n.5 above). Bayou's imagined intercircuit conflict provides no basis for granting plenary review.

II. The courts below correctly dismissed Bayou's claim for divestiture

The rejection by the courts below of Bayou's claim for divestiture presents no issue warranting review on certiorari. Bayou has provided no basis on the facts of this case for obtaining any equitable relief, and in any event divestiture is not a remedy available to a private plaintiff.

A. Bayou has not sought an injunction against any future conduct by Respondents; its sole claim for equitable relief is its claim for divestiture. Yet the antitrust violations alleged by Bayou and their relationship to Bayou's claimed injuries make it plain that there is no basis for divestiture in this case even if that remedy were available.

A plaintiff is not entitled to equitable relief in an antitrust case unless he can prove a threatened antitrust injury, i.e., a threatened injury that reflects the likely anticompetitive effects of the alleged violation. *Schoenkopf v. Brown & Williamson Tobacco Co.*, 637 F.2d 205, 210-11 (3d Cir. 1980) (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 489); *accord*, *Central National Bank v. Rainbolt*, 720 F.2d 1183, 1186-87 (10th Cir. 1983); *Carter Hawley Hale Stores v. The Limited*, 1984-1 Trade Cas. ¶ 66,046, at 68,634-36 (C.D. Cal. 1984). As discussed at pp. 7-16 above, Bayou failed to establish that it had suffered any actual antitrust injury on the facts here. Since Bayou also failed to show that any future antitrust injury was threatened, it had no basis for a claim to any kind of equitable relief—as the courts below properly concluded. (Pet. App. 10 (725 F.2d at 305); Pet. App. 40-42 (543 F. Supp. at 1269-70)).

Bayou's request for a divestiture order was especially unwarranted. Equitable relief in a private antitrust case must bear a logical relationship to the injury to the plaintiff caused by the defendant's illegal conduct. *See, e.g.*, *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 669 F.2d 490, 495 (7th Cir.), *cert. denied*, 459 U.S. 943 (1982); *Schoenkopf*, 637 F.2d at 210. For example, if Bayou had been able to prove that Respondents had engaged in predatory conduct, and that predation was likely to recur, the proper equitable relief would have been an injunction directly prohibiting the conduct—but not divestiture. *Ohio-Sealy*, 669 F.2d at 495. In this case, as the courts below correctly determined, Bayou failed to demonstrate any exclusionary conduct on the part of Respondents. At most, Bayou raised an issue of fact as to the legality of the acquisition of LCDP. But if Bayou is correct in its allegation that the

LCDP acquisition will lessen competition, it is difficult to see how Bayou would be injured; the most likely result is that Bayou would *benefit* by having to face less competition. *See Schoenkopf*, 637 F.2d at 211; *Carter Hawley*, 1984-1 Trade Cas. at 68,635-36; Easterbrook & Fishel, *Antitrust Suits by Targets of Tender Offers*, 80 Mich. L. Rev. at 1160. In any event, Bayou failed to allege any threatened harm to itself flowing from an anticompetitive effect of the acquisition that a divestiture order would remedy. That failure made it entirely appropriate for the courts below to reject Bayou's claim for divestiture without reaching the question whether divestiture is available in a private action.[7]

B. Divestiture is a drastic remedy that can have serious adverse consequences for the stockholders, officers, and employees of the companies involved. *See United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 326 (1961); *id.* at 350-55 (Frankfurter, J., dissenting). Although courts have ordered divestiture in antitrust suits brought by the Government, *see, e.g.*, *id.*, in the 70-year history of section 16 of the Clayton Act, 15 U.S.C. § 26, no company has ever been divested as a result of a decree in a private action. That fact is compelling evidence that the remedy is not available at the hands of a private suitor.

Bayou cites no court of appeals decision holding that divestiture is available in a private case, for no circuit court has so held. The one appellate decision Bayou cites (Pet. 18), *NBO Industries Treadway Cos. v. Brunswick Corp.*, 523 F.2d 262

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7 Bayou's claim for divestiture would have to be rejected anyway because Bayou was guilty of laches. Bayou did not file this action until February 1979, and never sought to obtain any preliminary injunctive relief in the interim. During the hiatus of almost four years after the acquisition agreement, the bottling and distribution of Dr Pepper were integrated into LCC's general operations. Granting dissolution in this case would thus seriously disrupt the distribution of Dr Pepper in the Lake Charles area, and it would punitively deprive LCC of the substantial investment it has made in the goodwill of the Dr Pepper brand over the last eight years.

(3d Cir. 1975), *rev'd on other grounds sub nom. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), declined to reach the question. *Id.* at 279 ("we need not, in this case, decide a rule of general application with respect to the availability of divestiture relief under § 16").[8]

The leading case on the point is *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d 913, 920-25 (9th Cir. 1975). The court there carefully reviewed the legislative history of section 16 and concluded that, in enacting a general provision allowing "injunctive relief," Congress had not intended to allow private parties the extraordinary remedy of dissolution or divestiture. For example, the court noted the statement during the hearings of Congressman John Floyd, a member of the House Judiciary Committee which reported the Clayton bill. Congressman Floyd said:

> We did not intend by section [16] to give the individual the same power to bring a suit to dissolve the corporation that the Government has . . . . We discussed that very thoroughly among ourselves and we decided he should not have [it].

Hearings on Trust Legislation Before the House Committee on the Judiciary, 63rd Cong., 2d Sess. 842 (1914) (quoted in 518 F.2d at 922). *Accord, e.g., Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1059-60 (6th Cir. 1984); *Calnetics Corp. v. Volkswagen of America*, 532 F.2d 674, 692 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976). This conclusion is in accord with the contemporaneous view of section 16 as expressed in a

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8 A few district court decisions have indicated that divestiture is available, *e.g.*, Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 402 F. Supp. 636, 638 & n.* (S.D.N.Y 1975), but the discussion in each case was hypothetical because divestiture was never required. One recent case, Parrish's Cake Decorating Supplies, Inc. v. Wilton Enterprises, 1984-1 Trade Cas. ¶ 65,917 (N.D. Ill. 1984), purported to order divestiture, but the defendant's interest in the acquired company had been sold prior to the issuance of the decree.

unanimous line of decisions in the 12 years after the statute was passed. *Continental Securities Co. v. Michigan Central R.R.*, 16 F.2d 378, 379-80 (6th Cir. 1926), *cert. denied*, 274 U.S. 741 (1927); *Graves v. Cambria Steel Co.*, 298 F. 761, 762 (S.D.N.Y. 1924); *Venner v. Pennsylvania Steel Co.*, 250 F. 292, 296 (D.N.J. 1918). As Judge Learned Hand said in 1924: "I cannot suppose that any one would argue that a private suit for dissolution would lie under section 16 of the Clayton Act." *Graves*, 298 F. at 762.

Thus, the law is clear that divestiture is unavailable as a remedy in a private action. And since there is no conflict in the circuits in this regard, there is no reason for granting plenary review.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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